Supreme Court, U.S.
FILED

JUN - 6 2002

OFFICE OF THE CLERK

No. 01-011827

In The
Supreme Court of the United States

E. JOSEPH FACE, JR., in his official capacity as Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission, and SUSAN E. HANCOCK, in her official capacity as Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

Petitioners,

v.

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM H. HURD
State Solicitor
Counsel of Record

900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 371-0200 (facsimile)

Counsel for Petitioners

JUDITH WILLIAMS JAGDMANN
Deputy Attorney General

WILLIAM E. THRO
Special Assistant Attorney General

A. ANN BERKEBILE
CHRISTY A. MCCORMICK
Assistant Attorneys General

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

76PS

QUESTIONS PRESENTED

1. When the plaintiffs prevail in a suit against state officers, in their official capacities, to enforce federal statutes for which sovereign immunity has not been abrogated or waived, does sovereign immunity bar an award of attorneys' fees?

2. Assuming that sovereign immunity does not bar an award of attorneys' fees, do constitutional principles of dual sovereignty – including sovereign immunity – preclude an interpretation of 42 U.S.C. § 1988(b) that discriminates against the States?

PARTIES TO THE PROCEEDINGS

The petitioners are two officials of the Virginia State Corporation Commission, each of whom was sued only in his official capacity: (a) E. Joseph Face, Jr., Commissioner of Financial Institutions, and (b) Susan E. Hancock, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions. Deputy Commissioner Hancock is the State Officer charged with the enforcement of *Virginia Code* §§ 6.1-330.83 and 6.1-330.85, and is responsible to Commissioner Face for her actions.

The respondent is the National Home Equity Mortgage Association, a trade organization of home mortgage lenders.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
I. THIS COURT SHOULD GRANT REVIEW TO REVISIT *HUTTO* IN LIGHT OF ITS SOVEREIGN IMMUNITY JURISPRUDENCE	6
A. Background: Sovereign Immunity Revitalized	6
B. The *Hutto* Decision	8
C. The *Hutto* Dissent	9
D. Post-*Hutto* Developments	12
1. Views of the Framers	12
2. *Seminole Tribe* Standard	13
3. Circumvention of Sovereign Immunity	17
E. Summary	18

TABLE OF CONTENTS – Continued

Page

II. THIS COURT SHOULD GRANT REVIEW TO REVISIT *HENSLEY* IN LIGHT OF ITS DUAL SOVEREIGNTY JURISPRUDENCE 19

A. The *Hensley* Decision 19

B. Revival of Dual Sovereignty 23

1. Clear Statement Rule 25

2. Sovereign Immunity Prohibits the Courts from Discriminating against the States as a Class 27

C. Summary 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 2

Alden v. Maine, 527 U.S. 706 (1999) 3, 7, 12, 25

Aldridge v. Williams, 44 U.S. (3 How.) 9 (1845) 22

Alexander v. Sandoval, 532 U.S. 275 (2001) 6, 26

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 13

Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796) 12

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 25

Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) 7, 16, 17, 18

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 20, 21

City of Boerne v. Flores, 521 U.S. 507 (1997) 15, 16, 17

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 7, 17, 18

Correctional Services Corp. v. Malesko, 122 S.Ct. 515 (2001) 26, 27

Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) 26

Dellmuth v. Muth, 491 U.S. 223 (1989) 15

Ex Parte Young, 209 U.S. 123 (1908) 7, 8, 18

Fairmont Creamery Co. v. Minnesota, 274 U.S. 70 (1927) 28

TABLE OF AUTHORITIES – Continued

Page

Federal Maritime Comm'n v. South Carolina Ports Auth., No. 01-46, slip op. (U.S. May 28, 2002) 1, 3, 12, 23

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 6, 7, 8

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) ..... *passim*

Garcia v. S.U.N.Y. Health Sciences Ctr., 280 F.3d 98 (2nd Cir. 2001) 6

Gregory v. Ashcroft, 501 U.S. 452 (1991) 24, 25

Hensley v. Eckerhart, 461 U.S. 424 (1983) ..... *passim*

Humenansky v. Regents of the Univ. of Minn., 152 F.3d 822 (8th Cir. 1998), *cert. denied, sub nom. United States v. Regents of the Univ of Minn.*, 528 U.S. 1114 (2000) 13

Hutto v. Finey, 437 U.S. 678 (1978) ..... *passim*

Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000) (*en banc*), *cert. denied, sub nom. Arkansas Dep't of Educ. v. Jim C.*, 533 U.S. 949 (2001) 6

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) ..... *passim*

LaPides v. Board of Regents, 122 S.Ct. 1640 (2002) 6

Litman v. George Mason Univ., 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000) 6

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 25

National Home Mortgage Ass'n v. Face, 239 F.3d 633 (4th Cir.), *cert. denied*, 122 S.Ct. 58 (2001) 4

TABLE OF AUTHORITIES – Continued

Page

New York v. United States, 505 U.S. 144 (1992).....3, 23

Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998).....22

Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426, 122 S.Ct. 934 (2002).....26

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).....25

Printz v. United States, 521 U.S. 898 (1997).....3, 25

Quern v. Jordan, 440 U.S. 332 (1979) 8

Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 122 S.Ct. 999 (2002).....26

Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999).....6, 8

Seminole Tribe v. Florida, 517 U.S. 44 (1996).....*passim*

United States v. Lopez, 514 U.S. 549 (1995).....26

U.S. Term Limits v. Thornton, 514 U.S. 779 (1995).....23

Verizon v. Maryland Public Service Comm'n, 122 S.Ct. 1753 (2002).....7, 20

Webster v. Fall, 266 U.S. 507 (1925).....22

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1990).....7, 25

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. I, § 8, cl.3 5

U.S. Const., Amend X 2, 3

TABLE OF AUTHORITIES – Continued

Page

U.S. Const., Amend XI ..... *passim*

U.S. Const., Amend XIV, § 5 ..... 13, 15, 16, 22

STATUTES

Virginia Code § 6.1-330.83 4

Virginia Code § 6.1-330.85 4

12 U.S.C. § 3801 4

20 U.S.C. § 1681 3

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988(b) ..... *passim*

42 U.S.C. § 2000bb 3

42 U.S.C. § 2000cc 3

42 U.S.C. § 2000d 3

COURT RULE

Sup. Ct. R. 29.4(b) 1

OTHER AUTHORITIES

William Blackstone, *Commentaries On The Laws of England* 237 (Photo reprint. 1979) (1768) 18

John Dickinson, *Letters From A Pennsylvania Farmer* 23

The Federalist No. 28 (Alexander Hamilton) 24

The Federalist No. 39 (James Madison) 24

TABLE OF AUTHORITIES – Continued

Page

The Federalist No. 51 (James Madison) 24

The Federalist No. 81 (Alexander Hamilton) 24

Alfred H. Kelly, Winfred A. Harbison & Herman Belz, *The American Constitution: Its Origins and Development* 48-51 (6th ed. 1985).....23

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 17 (1997).....23

J. Harvie Wilkinson, III, *Federalism for the Future*, 74 S. Cal. L. Rev. 523 (2001) 25

PETITION FOR WRIT OF CERTIORARI

Two officials of the Virginia State Corporation Commission – E. Joseph Face, Jr., and Susan E. Hancock (collectively, "the Commonwealth") – respectfully petition the Court for a writ of *certiorari* to review the judgment of the court of appeals, which ruled that sovereign immunity does not protect the Commonwealth's state treasury against an award of attorneys fees, even though the statute authorizing such awards, as interpreted by this Court, denies States the even-handed treatment that traditionally accompanied the award of costs.

INTRODUCTION

A generation ago, a bare majority of this Court held that sovereign immunity did not bar an award of attorneys' fees under 42 U.S.C. § 1988(b) ("§ 1988"). *See Hutto v. Finey*, 437 U.S. 678, 695 (1978). Shortly thereafter, this Court interpreted § 1988 as mandating that prevailing plaintiffs should routinely recover fees against the States, but that prevailing States should rarely recover fees against plaintiffs. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). However, subsequent decisions of this Court have cast serious doubt on the results in *Hutto* and *Hensley*.[1] "Dual sovereignty is a defining feature of our Nation's constitutional blueprint," and an "integral component" of the States' sovereignty is "immunity from private suits." *Federal Maritime Comm'n v. South Carolina Ports Auth.*, No. 01-46, slip op. at 6 (U.S. May 28,

[1] The Commonwealth is not suggesting that § 1988 is unconstitutional. Rather, the Commonwealth is simply suggesting that the interpretations of § 1988 announced in *Hutto* and *Hensley* are inconsistent with the principles stated in this Court's most recent jurisprudence, and that, in order to avoid unconstitutionality, a revised interpretation is necessary when § 1988 is applied to the States. Thus, there is no reason to notify the Solicitor General that the constitutionality of a federal law is being challenged. *See* Sup. Ct. R. 29.4(b). However, this Court may wish to invite the Solicitor General to express the views of the United States.

2002). Quite simply, if *Hutto* and *Hensley* were to come before this Court today, it seems likely that this Court would rule in exactly the opposite manner. Yet, because only this Court can overrule or modify its decisions, *Hutto* and *Hensley* remain the law of the land. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997). This petition presents this Court with an opportunity to revisit *Hutto* and *Hensley* in light of its more recent jurisprudence.[2]

OPINIONS BELOW

The opinion of the court of appeals is reported at 283 F.3d 220 (4th Cir. 2002). It is reprinted in the appendix to this petition at App. 1. The opinion of the district court is unreported, but is reprinted at App. 16.

JURISDICTION

The court of appeals entered its judgment on March 8, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This petition involves the following constitutional and statutory provisions.

1. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[3]

---

[2] Because only this Court can overrule or modify its own decisions, there will never be a split among the courts of appeal or the state supreme courts on these issues. The only way for these issues to be reviewed is for this Court to revisit its own previous decisions.

[3] As this Court observed: "The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a

(Continued on following page)

2. The Eleventh Amendment to the United States Constitution, provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State."[4]

3. The federal statute at issue, 42 U.S.C. § 1988(b), provides, in pertinent part: "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318,[5] the Religious Freedom Restoration Act of 1993,[6] the Religious Land Use and Institutionalized Persons Act of 2000,[7] Title VI of the Civil Rights Act of 1964,[8] or section 13981 of this title,[9] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ."

4. The federal statute which allowed the plaintiff to sue these state officers, 42 U.S.C. § 1983 ("§ 1983"), provides, in pertinent part: "Every person who, under color of any

---

tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power." *New York v. United States,* 505 U.S. 144, 156-57 (1992). Moreover, the Tenth Amendment is not the exclusive textual source of protection for principles of federalism. *See Printz v. United States*, 521 U.S. 898, 953 n.13 (1997).

[4] While the Eleventh Amendment confirms the existence of the States' sovereign immunity, it "does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Federal Maritime Comm'n*, No. 01-46, slip op. at 7 (U.S. May 28, 2002). *See also Alden v. Maine*, 527 U.S. 706, 713 (1999) ("sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment.")

[5] *See* 20 U.S.C. § 1681.

[6] *See* 42 U.S.C. § 2000bb.

[7] *See* 42 U.S.C. § 2000cc.

[8] *See* 42 U.S.C. § 2000d.

[9] The Violence Against Women Act.

statute, ordinance, regulation, custom, or usage of any State . . . subjects . . . any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding."

STATEMENT OF THE CASE

This petition arises out of an award of attorneys' fees that followed respondent's successful challenge of two Virginia consumer protection statutes. The respondent – the National Home Equity Mortgage Association ("NHEMA") – is a trade association of home mortgage lenders. NHEMA challenged the constitutionality of *Virginia Code* §§ 6.1-330.83 and 6.1-330.85, which limited the ability of state-chartered financial institutions to impose penalties on consumers who pre-pay their mortgages (*e.g.*, when a homeowner refinances or sells his home). Specifically, NHEMA contended that the two state statutes were preempted by a federal law, the Alternative Mortgage Transaction Parity Act, 12 U.S.C. § 3801 ("the Parity Act"). The district court agreed with respondent and entered a permanent injunction prohibiting the petitioners from enforcing these statutes. *See* 64 F. Supp. 2d 584 (E.D. Va. 1999). On appeal, the Fourth Circuit affirmed. *See National Home Mortgage Ass'n v. Face,* 239 F.3d 633 (4th Cir.), *cert. denied*, 122 S.Ct. 58 (2001).

Following the Fourth Circuit's decision on the merits, the district court turned its attention to the petition for attorneys' fees and costs, filed by NHEMA under § 1988 ("the fee petition"). The Commonwealth defended against the fee petition on two grounds relevant to this petition for *certiorari*:

- First, sovereign immunity bars an award of attorneys' fees against the Commonwealth where Congress has not acted under Section 5 of the Fourteenth Amendment to abrogate that immunity. Here the relevant federal law – the Parity Act – was not enacted under Section 5. It was enacted

under the Commerce Clause, U.S. Const., Art. I, § 8, cl.3.

- Second, if sovereign immunity does not absolutely bar an award of attorneys' fees under these circumstances, then principles of federalism and sovereign immunity require the States to be treated *no less favorably* than other litigants. Section 1988, as currently interpreted, violates this principle because States are almost always required to pay attorneys' fees when they lose a lawsuit under § 1983, but are almost never allowed to collect attorneys' fees when they prevail in such a challenge. As a constitutional matter, when there has been no valid abrogation of sovereign immunity, prevailing state defendants and prevailing private plaintiffs must be treated alike. Moreover, the most appropriate standard to use in such an even-handed approach is the one that now governs awards to prevailing state defendants: that is, fees should only be awarded to a prevailing party if the opposing party's legal position is frivolous, unreasonable and without foundation. No one has suggested that the Commonwealth's position meets these criteria. Thus, the fee petition in this case must be denied.

In taking these positions, the Commonwealth was reserving the right to seek reexamination of this Court's decision in *Hutto*, which holds that sovereign immunity does not bar an award of attorneys' fees. The Commonwealth was also seeking eventual reexamination of – or, a distinction from – *Hensley*, which holds that prevailing plaintiffs are routinely entitled to attorneys' fees, at least where constitutional rights are at issue. Correctly recognizing that only this Court may reexamine and overrule its decisions, the court of appeals followed *Hutto*. The court of appeals also declined to adopt the distinction sought by the Commonwealth regarding *Hensley*, ruling instead that *Hensley* precluded an even-handed approach to attorneys' fees even though only economic rights were at issue here.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW TO REVISIT *HUTTO* IN LIGHT OF ITS SOVEREIGN IMMUNITY JURISPRUDENCE.

This Court should grant review in order to revisit *Hutto* in light of recent developments in its sovereign immunity jurisprudence. Quite simply, the conclusion in *Hutto*, that sovereign immunity does not bar a claim for attorneys' fees under § 1988, is incompatible with this Court's more recent pronouncements on the nature of sovereign immunity. Review is warranted to resolve this inconsistency.

A. Background: Sovereign Immunity Revitalized

Whenever private parties sue the State or state officers in their official capacities, sovereign immunity issues inevitably arise. Resolution of these issues depends upon the nature of the substantive statute being enforced. If the statute at issue is one where Congress has abrogated sovereign immunity – or the State has waived it – then sovereign immunity is no barrier to the litigation. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Congress abrogated sovereign immunity for Title VII claims); *LaPides v. Board of Regents*, 122 S.Ct. 1640 (2002) (State waived sovereign immunity by removing claim to federal court).[10] Alternatively, if the

---

[10] The lower federal courts have generally held that, by accepting federal funds, States waive their sovereign immunity for claims based on various anti-discrimination statutes. *See, e.g., Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *rev'd on other grounds sub nom. Alexander v. Sandoval*, 532 U.S. 275 (2001) (receipt of federal funds constitutes waiver of sovereign immunity for Title VI claims); *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000) (receipt of federal funds constitutes waiver of sovereign immunity for Title IX claims); *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (*en banc*), *cert. denied, sub nom. Arkansas Dep't of Educ. v. Jim C.*, 533 U.S. 949 (2001) (receipt of federal funds constitutes waiver of sovereign immunity for § 504 claims). *But see Garcia v.*

(Continued on following page)

statute at issue is one for which Congress has not properly abrogated sovereign immunity and for which the State has not waived its immunity, then sovereign immunity bars all claims based on the statute. *See Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (no abrogation for ADA Title I claims); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (no abrogation for ADEA claims); *Alden v. Maine*, 527 U.S. 706 (1999) (implicitly holding no abrogation for FLSA claims); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (no waiver for Lanham Act claims); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (no abrogation for intellectual property claims); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (no abrogation for Indian Gaming Act claims).

Of course, even where there has been no abrogation or waiver of sovereign immunity, the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), generally allows private parties to obtain *declaratory* and *injunctive* relief against state officers in their official capacities.[11] *See Verizon v. Maryland Public Service Comm'n*, 122 S.Ct. 1753, 1761 (2002). Consequently, when seeking such a limited remedy, a private party can sue state officers in their official capacities to enforce a federal statute for which there is no abrogation or waiver. *See Verizon*, 122 S.Ct. at 1760

S.U.N.Y. Health Sciences Ctr., 280 F.3d 98, 114-15 (2nd Cir. 2001) (receipt of federal funds is not waiver for § 504 claims). This Court has held that Congress has abrogated sovereign immunity for Title VII claims (race, gender, and religious discrimination claims in employment context). *See Fitzpatrick*, 427 U.S. at 447-48. When these cases are read together, the conclusion is that the States do not enjoy sovereign immunity from discrimination claims based on race or gender. Waiver of sovereign immunity in the context of disability-based discrimination claims is an unresolved question, and is not affected by the issues raised in this petition.

[11] This is true regardless of whether the suit is brought pursuant to the Supremacy Clause or pursuant to 42 U.S.C. § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1990).

(declining to address waiver of sovereign immunity because doctrine of *Ex Parte Young* was applicable).

The availability of limited remedies under *Ex Parte Young* necessarily gives rise to issues involving entitlement to attorneys' fees under § 1988.[12] Specifically, does not sovereign immunity bar such an award of fees? Alternatively, if sovereign immunity does not bar an award of fees, is it nevertheless improper to interpret § 1988 in a manner that discriminates against the States?

B. The *Hutto* Decision

In 1978, when *Hutto* was decided, this Court's decisions imposed few, if any, restraints on the ability of Congress to abrogate sovereign immunity. Indeed, the very idea that Congress could abrogate sovereign immunity had been announced only two years earlier. *See Fitzpatrick*, 427 U.S. at 451-52. Thus, when determining whether sovereign immunity barred an award of attorneys' fees under § 1988, this Court made only a cursory inquiry into whether there was some remote relationship between the statute and the substantive guarantees of the Fourteenth Amendment. The analysis was surprisingly brief:

> As this Court made clear in *Fitzpatrick*, Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. When it passed the Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States when their officials are sued in their official capacities. The Act itself could not be

---

[12] By its very terms, § 1988 applies only to claims brought under specifically enumerated federal statutes, including *inter alia* Title VI, Title IX and § 1983. Although lower courts have held that the States have waived sovereign immunity for Title VI and Title IX, *see Sandoval* (Title VI), *Litman* (Title IX), sovereign immunity has not been abrogated nor waived for any of the other statutes mentioned in § 1988. *See Quern v. Jordan*, 440 U.S. 332 (1979) (sovereign immunity bars § 1983 claim directly against State).

> broader. It applies to "any" action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions; indeed, the Act primarily applies to laws passed specifically to restrain state action.

Hutto, 437 U.S. at 693-94 (citations omitted). Moreover, this Court noted that sovereign immunity traditionally had not applied to the payment of costs by the States. *See id.* at 695-96. Since Congress, in direct contradiction of several hundred years of common law tradition, had redefined the term "costs" to include attorneys' fees, sovereign immunity did not bar an award of attorneys' fees. *See id.* at 693-98. In other words, this Court acquiesced, at least implicitly, in Congress' attempt to circumvent sovereign immunity by manipulating well-defined legal terms from their traditionally accepted meaning.

C. The *Hutto* Dissent

Justice Powell, joined by then Chief Justice Burger, Justice Stewart, and then Associate Justice Rehnquist, vigorously dissented.[13] In a passage that foreshadowed the future direction of this Court's sovereign immunity jurisprudence, Justice Powell observed:

> I cannot subscribe to Part II-B's reading of the Eleventh Amendment as permitting counsel-fee awards against the State on the authority of a statute that concededly does not effect "an express statutory waiver of the States' immunity."
>
> *Edelman v. Jordan* rejected the argument that 42 U.S.C. § 1983 "was intended to create a waiver of the State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." In a § 1983 action "a federal court's remedial power, consistent

---

[13] Justice Powell, joined by then Chief Justice Burger, also concurred in other portions of *Hutto*. *See* 437 U.S. at 704.

> with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, . . . and may not include a retroactive award which requires the payment of funds from the state treasury." There is no indication in the language of the Civil Rights Attorneys' Fees Awards Act of 1976 (Act), that Congress sought to overrule that holding. In this case, as in *Edelman*, "the threshold fact of congressional authorization to sue a class of defendants which *literally* includes States is wholly absent." Absent such authorization, grounded in statutory language sufficiently clear to alert every voting Member of Congress of the constitutional implications of particular legislation, we undermine the values of federalism served by the Eleventh Amendment by inferring from congressional silence an intent to "place new or even enormous fiscal burdens on the States."
>
> The Court notes that the Committee Reports and the defeat of two proposed amendments indicate a purpose to authorize counsel-fee awards against the States. That evidence might provide persuasive support for a finding of "waiver" if this case involved "a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities." But in this sensitive area of conflicting interests of constitutional dimension, we should not permit items of legislative history to substitute for explicit statutory language. The Court should be "hesitant to presume general congressional awareness," of Eleventh Amendment consequences of a statute that does not make express provision for monetary recovery against the States.

Id. at 704-06 (Powell, J., joined by Burger, C.J., Stewart, Rehnquist, J.J., dissenting in part) (emphasis added) (citations and footnotes omitted). In other words, Justice Powell and his dissenting colleagues rejected the notion

that sovereign immunity would permit an award of fees for the successful enforcement of a statute for which sovereign immunity had not been abrogated or waived. Justice Powell and his dissenting colleagues also emphatically rejected the idea that sovereign immunity could be abrogated without express language to that effect in the statutory text.

Moreover, Justice Powell and his dissenting colleagues were skeptical of the concept, embraced by the *Hutto* majority, that Congress could avoid sovereign immunity simply by changing the traditional term "costs." Justice Powell observed:

> I am unwilling to ignore otherwise applicable principles simply because the statute in question imposes substantial monetary liability as an element of "costs." Counsel fees traditionally have not been part of the routine litigation expenses assessed against parties in American courts. Quite unlike those routine expenses, an award of counsel fees may involve substantial sums and is not a charge intimately related to the mechanics of the litigation. I therefore cannot accept the Court's assumption that counsel-fee awards are part of "the ordinary discipline of the courtroom."
>
> Moreover, counsel-fee awards cannot be viewed as having the kind of "ancillary effect on the state treasury," that avoids the need for an explicit waiver of Eleventh Amendment protections. As with damages and restitutory relief, an award of counsel fees could impose a substantial burden on the State to make unbudgeted disbursements to satisfy an obligation stemming from past (as opposed to post-litigation) activities. It stretches the rationale of *Edelman* beyond recognition to characterize such awards as "the necessary result of compliance with decrees which by their terms [are] prospective in nature." In the case of a purely prospective decree, budgeting can take account of the expenditures entailed in compliance, and the State retains some

> flexibility in implementing the decree, which may reduce the impact on the state fisc. In some situations fiscal considerations may induce the State to curtail the activity triggering the constitutional obligation. Here, in contrast, the State must satisfy a potentially substantial liability without the measure of flexibility that would be available with respect to prospective relief.

Id. at 707-08 (Powell, J., joined by Burger, C.J., Stewart, Rehnquist, J.J., dissenting in part) (citations and footnotes omitted). In sum, sovereign immunity cannot be circumvented simply by engaging in semantic games.

D. Post-*Hutto* Developments

In the years since *Hutto*, this Court has revitalized the original meaning of sovereign immunity. *See Federal Maritime Comm'n*, No. 01-46, slip op. (U.S. May 28, 2002). It has done so in three ways: (1) by emphasizing the views of the Founders, (2) by tightening the requirements for abrogating sovereign immunity, and (3) by disapproving legislative attempts to circumvent sovereign immunity. Each will be discussed in turn.

1. Views of the Framers

First, this Court has recognized that sovereign immunity is far broader than the text of the Eleventh Amendment. *See Alden*, 527 U.S. at 730. Rather, it bars all "proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union." *Federal Maritime Comm'n*, No. 01-46, slip op. at 9 (U.S. May 28, 2002). Thus, in determining whether sovereign immunity bars an award of costs against the States under § 1988, this Court must ask whether, in 1788, a party who obtained injunctive relief against a state officer in federal court would be able to recover attorneys' fees against the State treasury.

The answer is clearly no. In *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796), this Court held that attorneys'

fees were not recoverable against *any party* in federal court. *See also Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 249-50 (1975) (discussing history of availability of attorneys' fees in federal courts.) Obviously, if *no* party was liable for attorneys' fees in 1796, then the sovereigns, be it the national sovereign or the States, could not be liable for attorneys' fees in federal court in that era. The Framers would not have thought otherwise. Thus, under this Court's revitalized sovereign immunity jurisprudence, sovereign immunity must bar an award of attorneys' fees against the States in federal court.

2. *Seminole Tribe* Standard

Second, in *Seminole Tribe*, this Court adopted Justice Powell's suggestion and tightened the requirements for abrogation of sovereign immunity. Today, congressional abrogation of sovereign immunity can be accomplished only if a stringent two-part test is met. It must be shown that (1) Congress unequivocally expressed its intent to abrogate immunity for claims based on a specific statute; and (2) Congress acted pursuant to § 5 of the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 56-59. Unless both conditions have been satisfied, Congress' attempt at abrogation is invalid. *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822, 824 (8th Cir. 1998), *cert. denied, sub nom. United States v. Regents of the Univ. of Minn.*, 528 U.S. 1114 (2000).

a. Nature of the Claim

Before applying the *Seminole Tribe* test to this case, it is first necessary to identify the nature of the claim and the statute at issue. This inquiry requires three levels of analysis, looking first at § 1988, then at § 1983 (the statute allegedly triggering § 1988), and finally at the Parity Act (the statute being enforced through § 1983).

i. NHEMA's case is a claim for attorneys' fees under § 1988. Under *Hensley*, there is a substantive right to recover attorneys' fees when plaintiffs have prevailed

under any of the statutes enumerated in § 1988. For some of these statutes, Congress has arguably abrogated sovereign immunity. For other statutes, States conceivably may have waived their sovereign immunity. Logically, if the statute that is the basis for invoking § 1988 is one for which sovereign immunity has been abrogated or waived, then sovereign immunity does not bar recovery of fees. Conversely, if the statute that is the basis for invoking § 1988 is one for which sovereign immunity has *not* been abrogated or waived, then sovereign immunity must bar the claim. Thus, the first critical issue is identifying the statute that NHEMA invokes for claiming entitlement to an award of fees under § 1988.

ii. The statute on which NHEMA relies in seeking fees under § 1988 is § 1983. However, unlike other statutes enumerated by § 1988, § 1983 does not confer substantive rights. Rather, it is simply a vehicle by which private parties may enforce substantive rights already conferred by the Constitution or by other federal statutes. Again, Congress has arguably abrogated sovereign immunity for many of the federal statutes enforceable through § 1983. Conceivably, the States have waived sovereign immunity for other statutes enforceable through § 1983. Logically, if the statute being enforced through § 1983 is one for which sovereign immunity has been abrogated or waived, then there is no sovereign immunity bar to the recovery of fees. Conversely, if the statute being enforced through § 1983 is one for which sovereign immunity has *not* been abrogated or waived, then sovereign immunity bars the recovery of fees. Thus, the second critical question becomes: what federal statute was NHEMA enforcing through § 1983?

iii. The answer, of course, is the Parity Act. Therefore, the third critical question is whether sovereign immunity has been abrogated or waived for claims based on the Parity Act. If so, then there is no bar to NHEMA's recovery of fees for having prevailed in its § 1983 claim to enforce the Parity Act. Conversely, if sovereign immunity has not been abrogated or waived for the Parity Act, NHEMA cannot recover fees under § 1988. There is no suggestion here that the Commonwealth has *waived* sovereign

immunity. Thus, the ultimate question is whether Congress has abrogated sovereign immunity for the Parity Act. Therefore, the two-part inquiry of *Seminole Tribe* must be applied to the Parity Act. As the following discussion will show, sovereign immunity has not been so abrogated.

b. Application of *Seminole Tribe*

i. Application of the two part test of *Seminole Tribe* compels the conclusion that sovereign immunity has not been abrogated for the Parity Act. First, there is nothing in the Parity Act explicitly stating a Congressional intent to abrogate sovereign immunity. Under current sovereign immunity jurisprudence, a Congressional intent to abrogate cannot be inferred. *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). *See also Kimel*, 532 U.S. at 99-100 (Thomas J., joined by Kennedy, J., concurring in part and dissenting in part) (suggesting that the clear statement rule had not been met by the ADEA). This alone is enough to show that sovereign immunity has not been abrogated here.

ii. Moreover, even if Congress had expressed its intent to abrogate sovereign immunity, it would still not be enough for NHEMA to prevail. Under the second part of the *Seminole Tribe* test, Congress cannot effectuate an abrogation under its Article I powers; it must act pursuant to § 5 of the Fourteenth Amendment. Congress did not do so here. Nothing in the Parity Act suggests any relationship whatsoever with the Fourteenth Amendment.[14] Moreover, determining whether the attempt to abrogate sovereign immunity is valid under § 5 of the Fourteenth Amendment requires application of the two-part test from *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Even where Congress has passed a statute implicating the substantive

---

[14] Of course, even where Congress has said it is invoking the Fourteenth Amendment, its statement does not necessarily mean that it has actually done so. *See Florida Prepaid*, 527 U.S. at 637-38.

guarantees of the Fourteenth Amendment, it may not abrogate sovereign immunity for that statute unless it can (1) "identify conduct transgressing the Fourteenth Amendment's substantive provisions"; and (2) "tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid*, 527 U.S. at 639.

The first part of the *Flores* test – identifying the transgressing conduct – likewise has two components. First, the Court must "identify with some precision the scope of the constitutional right at issue." *Garrett*, 121 S.Ct. at 963.[15] Nothing in the Parity Act speaks to any constitutional right. Second, once the Court has "determined the metes and bounds of the constitutional right in question," the Court examines "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States. . . . " *Garrett*, 121 S.Ct. at 964.[16]

---

[15] In assessing whether Congress has identified unconstitutional conduct, courts look at judicial opinions, not the pronouncements of Congress. *See Kimel*, 528 U.S. at 81; *Flores*, 521 U.S. at 519. That is, Congress must defer to this Court's interpretation of the Constitution and not assume for itself the task of defining constitutional rights.

[16] In making this examination, this Court has carefully limited when unconstitutional conduct may be attributed to the States. For example, the Court recognizes that: (1) conduct that may violate federal law does not necessarily violate the Constitution, *see, e.g., Kimel*, 528 U.S. at 84-85 (finding the restrictions of the ADEA far more stringent than those imposed by the Equal Protection Clause); (2) conduct by private actors or society in general cannot be ascribed to the States, *see id.* at 649; (3) unconstitutional conduct by governmental entities that are not considered arms of the State cannot be ascribed to the State, *See Garrett*, 531 U.S. at 369 ("It would make no sense to consider constitutional violations on [the] part [of local government entities], as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment."); and (4) even if there is unconstitutional conduct by the States, the fact that one State or even several States have violated the Constitution does not constitute a pattern of constitutional violations by all the States, *see Kimel*, 528 U.S. at 89-90 ("Even if the California report had uncovered a pattern of unconstitutional age discrimination in the State's public agencies at the time, it nevertheless would have been insufficient to support Congress' 1974 extension of the ADEA to every State of the Union.").

Again, nothing in the Parity Act speaks to any history or pattern of unconstitutional conduct by the States. Of course, if there is no identified pattern of constitutional violations, then sovereign immunity has not been properly abrogated and the inquiry ends. *College Sav. Bank,* 527 U.S. at 675.

Alternatively, if a pattern of specific constitutional violations is found, then this Court must proceed to the second part of the *Flores* test and determine if the abrogation of sovereign immunity is a proportionate response to the violations. *See Florida Prepaid,* 527 U.S. at 646. In the case at bar, since the Parity Act does not implicate any such pattern, this second part of *Flores* is never reached.

In sum, the test for a valid abrogation of sovereign immunity is quite stringent and analogous to strict scrutiny in the context of the fundamental rights of individuals. Not surprisingly, since this Court began employing the strict abrogation test, not a single congressional attempt at abrogation has passed constitutional muster. *See Garrett*, 531 U.S. at 373-374; *Kimel*, 528 U.S. at 89-92; *Florida Prepaid*, 527 U.S. at 646-48, *Seminole Trible*, 517 U.S. at 75-76. Congress has not abrogated sovereign immunity for Parity Act claims enforced through § 1983, nor has the Commonwealth waived sovereign immunity for such claims. Thus, under this Court's revitalized sovereign immunity jurisprudence, sovereign immunity bars NHEMA's claim for attorneys' fees under § 1988.

3. Circumvention of Sovereign Immunity

Third, this Court has expressed disapproval of Congress' attempts to circumvent sovereign immunity by engaging in verbal manipulations. This Court observed:

> Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe.* Forced waiver and abrogation are not even different sides of the same coin – they are the same

> side of the same coin. . . . *There is little more than a verbal distinction between saying that Congress can make Florida liable to private parties for false or misleading advertising in interstate commerce of its prepaid tuition program, and saying the same thing but adding at the end "if Florida chooses to engage in such advertising."*

College Savings Bank, 527 U.S. at 683-84 (emphasis added) (citations omitted). In other words, "Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals." *Kimel*, 528 U.S. at 80. Consequently, Congress cannot circumvent sovereign immunity and indirectly undermine *Seminole Tribe*, *Florida Prepaid*, *Kimel*, and *Garrett* by blatant verbal manipulations, such as redefining "costs" to include attorneys' fees.

E. Summary

In sum, given this Court's revitalized sovereign immunity jurisprudence, the continued validity of *Hutto* is seriously in doubt. First, this Court now insists that application of sovereign immunity must turn on the state of the law at the time of the Constitution's adoption. Although English common law apparently allowed injunctive relief against governmental officers at the time of the Revolution, *see* William Blackstone, *Commentaries On The Laws Of England* 237 (photo reprint. 1979) (1768),[17] it is doubtful that one can find persuasive authority for the recovery of attorneys' fees against the public treasury in such a situation. Second, under the *Florida Prepaid-Kimel-Garrett* framework, this

---

[17] As a practical matter, there is no real distinction between Blackstone's concept that writs can be obtained against an agent of the crown who acts contrary to law and the doctrine of *Ex Parte Young* where federal courts may enjoin state officials who act contrary to federal law. In both instances, it is assumed that the sovereign cannot act contrary to law and that any official of the sovereign who does so cannot be acting in the name of the sovereign. Thus, the official is no longer entitled to the protections of the sovereign's immunity.

Court now demands that strict scrutiny be applied to Congress' attempts to abrogate sovereign immunity. Under this standard, it seems unlikely that Congress has validly abrogated sovereign immunity for Parity Act claims enforced through § 1983. Third, this Court has expressed skepticism about Congress' ability to circumvent sovereign immunity through statutory redefinitions of terms whose meaning has been long established. It is questionable whether Congress can circumvent sovereign immunity by changing a definition of "costs" that prevailed when the Constitution was ratified and that dates back through centuries of common law. Of course, this Court need not resolve these doubts in order to grant this petition. Rather, this Court should grant the petition and, after due deliberation, determine whether the sovereign immunity holding of *Hutto* should be overruled.

II. THIS COURT SHOULD GRANT REVIEW TO REVISIT *HENSLEY* IN LIGHT OF ITS DUAL SOVEREIGNTY JURISPRUDENCE.

This Court should grant review in order to revisit *Hensley* – as it applies to the States – in light of recent developments in its dual sovereignty jurisprudence. Quite simply, the conclusion in *Hensley*, that the proper interpretation of § 1988 is to award fees against losing States as a matter of course, but rarely to award fees against losing plaintiffs, is incompatible with this Court's more recent pronouncements on role of the States in our constitutional system. In our system of dual sovereignty, there are certain structural safeguards which preclude the institutions of the national sovereign, including the federal courts, from diminishing the sovereignty of the States. Yet, *Hensley,* as applied to the States, does exactly that. Review is warranted to resolve this inconsistency.

A. The *Hensley* Decision

1. By its very terms, § 1988 grants federal courts the *discretion* to award attorneys' fees to prevailing parties in

certain types of litigation between private parties and governmental entities. There is nothing in the statute that mandates that the prevailing party should recover attorneys' fees as a matter of course. Certainly, there is nothing which states or even implies that private parties who prevail will almost certainly recover fees while the States will almost never recover. Because this Court "will not presume that the statute means what it neither says nor implies," *Verizon*, 122 S.Ct. at 1759, the obvious and logical interpretation of § 1988 is that it grants courts the discretion to award fees to prevailing parties and does not discriminate between prevailing plaintiffs and prevailing States.

2. Although this is the most compelling interpretation of the plain words of § 1988, this Court, in *Hensley*, adopted an interpretation of § 1988 whereby private parties who prevail recover fees as a matter of course, while States that prevail recover fees only in those rare instances where the plaintiffs' claims are frivolous. Although such an interpretation is at odds with the clear language of the statute and fundamentally alters the federal-state relationship, this Court's analysis was surprisingly sparse. Specifically, this Court observed:

> The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances. H.R.Rep. No. 94-1558, p. 1 (1976). Accordingly, a prevailing plaintiff "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" S.Rep. No. 94-1011, p. 4 (1976), U.S. Code Cong. & Admin. News 1976, p. 5912.

Hensley, 461 U.S. at 429 (citations original) (footnote omitted). Moreover, in a footnote, this Court observed:

> A prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. *See* H.R.Rep. No. 94-1558, p. 7 (1976); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) ("[A] district court may in its discretion

> award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.").

Hensley, 461 U.S. at 429 n.2 (citations and parenthetical original). In other words, the *sole* basis for this Court's conclusion that, under § 1988, prevailing plaintiffs should routinely recover attorneys' fees from the States, while prevailing States would almost never recover fees from the plaintiffs, was a series of statements made in congressional committee reports.[18] On that frail reed, this Court hung an interpretation of § 1988 that fundamentally disadvantages the States.

3. Moreover, to the extent this Court wishes to rely on committee reports rather than the text of the statute, the committee reports surrounding the adoption of § 1988 do not conflict with the Commonwealth's position. To illustrate, the House Committee Report makes it clear that the primary focus of § 1988 was "civil rights litigants" – that is, individuals claiming race or gender discrimination or the abridgement of individual rights specifically conferred by the Constitution. *See* H.R. Rep. No. 94-1559, pp. 1-5 (1976). Interpreting § 1988 asymmetrically, so as to benefit civil rights litigants at the expense of States, does not mean that an asymmetrical reading was also contemplated in cases involving only economic regulation statutes, such as the Parity Act. Treating the two sorts of cases differently also leaves room for the approach followed by lower courts in holding that sovereign immunity is abrogated or waived for racial and gender discrimination statutes. *See supra* at 6, n.10.[19]

---

[18] While the Court also cited *Christiansburg*, that case dealt with Title VII, a fee statute not within the coverage of § 1988.

[19] Furthermore, while *Hensley* read § 1988 asymmetrically, it did so in the context of a case involving the deprivation of *constitutional* rights, not economic rights arising under Commerce Clause enactments. Given the power of Congress to abrogate sovereign immunity

(Continued on following page)

4. While this reliance on congressional committee reports *may* have resulted in an interpretation consistent with the concerns of those who sponsored the legislation, such reliance ignores the rule that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). Over a century and a half ago, this Court explained:

> In expounding this law, the judgment of the court cannot, in any degree, be influenced by . . . the motives or reasons assigned by [legislators] for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language there used. . . .

Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845).[20] This Court's deviation from the rule that the actual text of the

---

under § 5 of the Fourteenth Amendment, *Hensley* was fundamentally different than the case at bar. This Court has never squarely addressed the issue of whether a different approach should be followed in cases involving only economic rights. While there are undoubtedly Commerce Clause cases where such asymmetrical treatment occurred, "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). Thus, *Hensley* does not necessarily apply here and need not be reversed in order for the Court to reach the result sought by the Commonwealth. This Court is free to consider the issue presented by the Commonwealth as one of first impression, and to rule in favor of the Commonwealth based on the merits of its position.

[20] As Justice Scalia noted in another context:

> It is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated. . . . Government by unexpressed intent is similarly tyrannical. It is the law that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts Constitution: A government of laws, not men.

(Continued on following page)

statute must control the interpretation of the statute is, by itself, sufficient reason to revisit *Hensley*. However, there is a more compelling reason for doing so.

B. Revival of Dual Sovereignty

The more compelling reason centers on this Court's post-*Hensley* recognition that "[d]ual sovereignty is a defining feature of our Nation's constitutional blueprint." *Federal Maritime Comm'n*, No. 01-46 slip op. at 6 (U.S. May 28, 2002). Quite simply, "the Constitution protects us from our own best intentions: *It divides power among sovereigns* and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 505 U.S. at 187 (emphasis added).[21]

> Men may intend what they will; but it is only the laws that they enact which bind us.

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 17 (1997).

[21] As Justice Kennedy wrote in a concurrence:

> The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privy, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J. concurring). Justice Kennedy's idea of dividing power between dual sovereigns is not new. As early as 1768, John Dickinson, in *Letters From A Pennsylvania Farmer*, suggested that sovereignty was divided between the British Parliament and the Colonial Legislatures. *See* Alfred H. Kelly, Winfred A. Harbison & Herman Belz, *The American Constitution: Its Origins and Development* 48-51 (6th ed. 1985). James Madison, writing in *The Federalist*, made the same point when he stated:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct

(Continued on following page)

Although the States surrendered many of their sovereign powers to the new national government, "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).[22] The principle that the Constitution divides power between *dual sovereigns*, the States and the national government, is reflected throughout the Constitution's text, particularly in the Constitution's conferral upon Congress of not all

---

> governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people. The different governments will control each other, at the same time that each will control itself.

The Federalist No. 51, at 347 (James Madison) (Jacob E. Cooke ed., 1961.). *See also The Federalist No. 39*, at 250 (James Madison); *The Federalist No. 28*, at 176 (Alexander Hamilton); *The Federalist No. 81* at 541 (Alexander Hamilton).

[22] As this Court noted:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.
>
> Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Gregory, 501 U.S. at 458 (citations omitted).

governmental powers, but only discrete, enumerated ones. *See Printz*, 521 U.S. at 919.[23]

1. Clear Statement Rule

"[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom" to be disregarded. *United States v. Lopez*, 514 U.S. 549, 578 (Kennedy, J., joined by O'Connor, J., concurring). Thus, this Court has developed certain rules to preserve the delicate equilibrium that is dual sovereignty. First, this Court requires that "if Congress intends to alter the usual constitutional balance between the States and the federal government, it must make its intention to do so unmistakably clear in the language of the statute." *Will*, 491 U.S. at 65 (internal quotation marks omitted). *See also Gregory*, 501 U.S. at 460-61 (clear statement required to dictate qualifications for state officials); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (no abrogation of sovereign immunity without clear statement); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981) ("*Pennhurst I*") (clear statement required to impose conditions on the receipt of federal funds). In a recent case, this Court recently observed:

> [W]e have good reason to rely on a clear statement principle of statutory construction. When "Congress intends to alter the 'usual constitutional

---

[23] Indeed, this division of sovereignty between the States and the national government is preserved and reinforced by the Constitution's structure. *See Alden*, 527 U.S. at 714-15. These structural limitations, which are above and beyond the limitations imposed by the text of the Bill of Rights or other constitutional provisions, restrict the power of the national government so as to preserve the sovereignty of the States, and vice versa. *See generally* J. Harvie Wilkinson III, *Federalism for the Future*, 74 S. Cal. L. Rev. 523 (2001). Thus, although the Constitution gives vast power to the national government, the national government remains one of enumerated, hence limited, powers. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

> balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" This principle applies when Congress "intends to pre-empt the historic powers of the States" or when it legislates in "'traditionally sensitive areas'" that "'affec[t] the federal balance.'" In such cases, the clear statement principle reflects "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."

Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 122 S.Ct. 999, 1006 (2002) (citations omitted) (federal law tolling statute of limitations for state law claims brought in federal court is inapplicable when a State is the defendant).[24] In other words, the sovereignty of the States is far

---

[24] Moreover, recent statements by this Court in other cases reinforce the primacy of the Clear Statement Rule. First, in *Alexander v. Sandoval*, 532 U.S. 275 (2001), this Court explicitly suggested that the Clear Statement Rule should be applied to the issue of whether there is implied private right of action to enforce Title VI against the States. *Id.* at 533. *See also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656-57 (1999) (Kennedy, J., joined by Rehnquist, C.J., Scalia & Thomas, J.J., dissenting) ("the Court must not imply a private cause of action for damages unless it can demonstrate that the congressional purpose to create the implied cause of action is so manifest that the State, when accepting federal funds, had clear notice of the terms and conditions of its monetary liability"). Second, in *Owasso Indep. Sch. Dist. v. Falvo*, 122 S.Ct. 934 (2002), this Court rejected the Tenth Circuit's interpretation because such an interpretation:

> would effect a drastic alteration of the existing allocation of responsibilities between States and the National Government in the operation of the Nation's schools. We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation. This principle guides our decision.

Id. at 939. Finally, in *Correctional Services Corp. v. Malesko*, 122 S.Ct. 515 (2001), this Court suggested that a clear statement of congressional intent is always necessary to establish a private cause of action to enforce rights against governmental actors. *See* 122 S.Ct. at 519, n.3

(Continued on following page)

too important to be undermined by inference or implication. Rather, the sovereignty of the States can only be diminished by a clear expression of congressional intent within the statutory text.

Under the Clear Statement Rule, if Congress wished to enact a statutory scheme whereby States were required to routinely pay attorneys' fees to prevailing plaintiffs but rarely allowed to recover fees when the States prevailed, such an arrangement would have to be clearly and unambiguously stated in the statutory text. The actual words of § 1988, not some committee report that was read by few, if any, members of Congress, would have to state that Congress intended to impose on the States such a disadvantageous result. Obviously, the text of § 1988 contains no such provision. Indeed, as Justice Powell and his dissenting colleagues in *Hutto* noted, § 1988 does not even contain a statement mandating that the States will be liable for attorneys' fees. *See Hutto*, 437 U.S. at 704-06. In short, the Clear Statement Rule precludes *Hensley's* asymmetrical interpretation of § 1988 from being applied against the States.

2. Sovereign Immunity Prohibits the Courts from Discriminating against the States as a Class.

Second, even if Congress may circumvent sovereign immunity by expanding the definition of costs so as to include attorneys' fees, sovereign immunity still requires that the States be treated even-handedly by any such expansion. In other words, if the definition of costs is going to be expanded to include attorneys' fees, *sovereign immunity requires that fees be awarded according to the same basic principles that traditionally guided the award of*

("we have retreated from our previous willingness to imply a cause of action where Congress has not provided one"). *See also id.* at 524 (Scalia, J., joined by Thomas, J., concurring) ("we have abandoned that power to invent 'implications' in the statutory field").

other costs. Those principles included an even-handedness that is absent from § 1988 under *Hensley* as applied by the court of appeals.

To illustrate, in the pre-*Hutto* case of *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 70 (1927), this Court held that sovereign immunity is not a defense when assessing "costs," a concept that the Court did not then construe to include attorneys' fees. In explaining this result, this Court reasoned that a federal court's interest in expeditious, orderly proceedings "justifies [the court] in treating the state *just as any other litigant* and in imposing costs upon it." *Id.* at 77 (emphasis added). Thus, the Court implicitly recognized that the traditional approach to awarding costs was even-handed. States entered into litigation bearing the same risk of costs as their adversaries. For both parties, a loss meant exposure to an award of costs; a win meant an opportunity to collect costs.

By contrast, under § 1988, States now enter into litigation with the virtual certainty that they will have to pay fees if they lose, but will be unable to collect them if they win. Even if an award of fees is in keeping with the tradition of awarding costs, the bias against States is not. Sovereign immunity – and the basic structure of the federal union – protects States against such discrimination.

In *Hutto*, the Court's rationale for permitting an award of attorneys' fees against States, despite the Eleventh Amendment, was that losing litigants – be they plaintiffs or defendants – traditionally have been called upon to pay the "costs" of litigation. 437 U.S. at 695-96.[25]

---

[25] Omitting attorneys' fees from the concept of "costs" was not simply a matter of tradition. There is also a fundamental conceptual distinction between "costs" designed to defray expenses incurred by the tribunal, and attorneys' fees designed to defray expenses incurred by a litigation adversary. *See Hutto*, 437 U.S. at 707-08 (Powell, J., joined by Burger, C.J., Stewart, Rehnquist, J.J., dissenting in part). Moreover, as Justice Powell and his dissenting colleagues noted, the *Hutto* majority's reliance on *Fairmont Creamery* was misplaced because the decision

(Continued on following page)

The Court expressly linked Congressional power to expand the definition of costs to even-handedness of treatment: "*Just as* a federal court may treat a State *like any other litigant* when it assesses costs, so also may Congress amend its definition of taxable costs. . . . " 437 U.S. at 696 (emphasis added). The decision in *Hensley* was a marked departure from the rationale of *Hutto* because, after *Hensley*, federal courts no longer treated States "like any other litigant" in assessing costs. Instead, they began to subject States to a rule far less favorable than the one applied to their litigation adversaries. Where an award of attorneys' fees does not comply with the even-handedness that has traditionally characterized exposure for costs, such an award cannot be justified by likening fees to the traditional concept of costs. Thus, reading § 1988 asymmetrically would cause the statute to violate sovereign immunity in violation of the Constitution. Such an interpretation must be avoided.

C. Summary

In sum, it seems unlikely that words buried in a committee report constitute a clear statement sufficient to radically diminish the sovereignty of the States and subject the States to a discriminatory statutory scheme. This is especially so when the discriminatory scheme – even if expressly adopted – would violate principles of sovereign immunity. Yet, this Court need not resolve these doubts in order to grant this petition. Rather, this Court should grant the petition and, after due deliberation, determine whether *Hensley* should be overruled, or at least distinguished in cases involving States, at least where civil rights are not at issue.

---

involved expenses that were traditionally "costs" and did not even mention attorneys' fees. *See id.* at 707 n.5.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 6th day of June 2002.

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM H. HURD
State Solicitor
Counsel of Record

JUDITH WILLIAMS JAGDMANN
Deputy Attorney General

WILLIAM E. THRO
Special Assistant Attorney General

A. ANN BERKEBILE
CHRISTY A. MCCORMICK
Assistant Attorneys General

900 East Main Street
Richmond, Virginia 23219
(804) 786-2436 (voice)
(804) 371-0200 (facsimile)

Counsel for Petitioners

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

National Home Equity Mortgage Association,

Plaintiff-Appellee,

v.

E. Joseph Face, Jr., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission; Susan E. Hancock, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

Defendants-Appellants,

and

Mark L. Earley,

Movant.

No. 01-1631

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-99-398-3)

Argued: January 25, 2002

Decided: March 8, 2002

Before NIEMEYER, LUTTIG, and KING, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Luttig and Judge King joined.

COUNSEL

ARGUED: William Henry Hurd, Solicitor General, Richmond, Virginia, for Appellants. Earle Duncan Getchell, Jr., MCGUIRE WOODS, L.L.P., Richmond, Virginia, for Appellee. **ON BRIEF:** Randolph A. Beales, Attorney General of Virginia, Judith Williams Jagdmann, Deputy Attorney General, Gregory E. Lucyk, Senior Assistant Attorney General, A. Ann Berkebile, Assistant Attorney General, Richmond, Virginia, for Appellants. Robert L. Hodges, William H. Baxter, II, MCGUIRE WOODS, L.L.P., Richmond, Virginia, for Appellee.

OPINION

NIEMEYER, Circuit Judge:

On the petition of the National Home Equity Mortgage Association ("NHEMA") for attorneys fees, costs, and expenses under 42 U.S.C. § 1988, the district court awarded NHEMA $79,750. On appeal, officials of the Commonwealth of Virginia contend that the award is barred by principles of sovereign immunity and is improper because NHEMA did not prevail on a claim based on a right secured by federal law so as to be enforceable under 42 U.S.C. § 1983. Alternatively, they argue that special circumstances make an award of attorneys fees in this case unjust. For the reasons that follow, we reject these arguments and affirm.

I

NHEMA commenced this action in June 1999 to obtain declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983, against Virginia officials ("Virginia") who

were, under color of State law, allegedly depriving NHEMA members of their federal rights under the Alterative Mortgage Transaction Parity Act of 1982, 12 U.S.C. § 3801 *et seq.* (the "Parity Act"). In its complaint, NHEMA alleged that each of its members has, pursuant to the Parity Act, "federal rights to charge prepayment penalties for every alternative mortgage transaction made, purchased, or enforced in the Commonwealth of Virginia without regard to state law" and that Virginia officials were "currently directing and authorizing the Bureau [of Financial Institutions] to enforce or threaten to enforce all of these punitive measures [under Virginia law] against NHEMA members who are lawfully invoking their federal rights to charge prepayment penalties under the Parity Act." It also alleged that "[t]he Parity Act creates immediately enforceable rights under 42 U.S.C. § 1983 and Congress has not foreclosed the enforcement of these rights through a civil action filed under 42 U.S.C. § 1983." Finally, NHEMA alleged that, under the Supremacy Clause, the Parity Act preempted Virginia law prohibiting prepayment penalties. NHEMA requested a declaratory judgment that the Virginia officials' actions were "depriving NHEMA members of their federal rights under color of state law," an appropriate injunction, and attorneys fees pursuant to 42 U.S.C. § 1988.

In its responses to NHEMA's complaint, Virginia took the position that NHEMA members did not have a cause of action under the Parity Act and that, in any event, the Parity Act did not preempt State regulations that prohibited prepayment penalties. In a memorandum in support of summary judgment, Virginia stated with respect to NHEMA's rights under the Parity Act, "The issue is thus whether the Parity Act implicitly created a private right of

enforcement under § 1983 to bar States from regulating prepayment penalties . . . . Nothing in the statute purports to create a federal right not to be regulated by States in the area of prepayment penalties." On the preemption issue, the State took the position that "[n]othing in the Parity Act, either expressly or in its structure and purpose, indicates that Congress intended to preempt state prepayment penalty laws."

On cross-motions for summary judgment, the district court granted summary judgment to NHEMA and permanently enjoined Virginia from enforcing its punitive measures, based on State law, against NHEMA members who were charging prepayment penalties as allowed under the Parity Act. In its memorandum opinion, the district court, applying the standard set forth in *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509 (1990), concluded that Congress had not foreclosed private enforcement of the rights created by the Parity Act and, therefore, "the plaintiff has a federally enforceable right under 42 U.S.C. § 1983." The court also held that "state regulation of prepayment penalties [is] preempted by the Parity Act" and, therefore, "sections 6.1-330.83 and 6.1-330.85 of the Code of Virginia [are] preempted by the Parity Act."

In its initial appeal to this court, Virginia did not challenge the district court's conclusion that the Parity Act created federally enforceable rights. It raised only one issue, "Whether the district court erred in ruling that the [Parity Act] and the 1996 actions of the Office of Thrift Supervision preempt §§ 6.1-330.83 and 6.1-330.85 of the Code of Virginia . . . which prescribes limits on prepayment penalties." Addressing only that issue, a unanimous panel of this court rejected the appeal and affirmed the

district court's judgment. *Nat'l Home Equity Mortgage Ass'n v. Face,* 239 F.3d 633 (4th Cir. 2001).

After prevailing on its appeal, NHEMA filed a motion for attorneys fees, costs and expenses under 42 U.S.C. § 1988. While Virginia stipulated that $79,750 would be an appropriate amount for an award of attorneys fees, costs and expenses in this case, it opposed any award based on its constitutional sovereign immunity arguments and on its argument that the district court's preemption ruling did not involve a claim under 42 U.S.C. § 1983 because the Supremacy Clause was not a source of substantive rights enforceable under § 1983. By order dated April 5, 2001, the district court rejected Virginia's defenses and, pursuant to 42 U.S.C. § 1988, awarded NHEMA $79,750 in attorneys fees, costs and expenses. The court reasoned that its earlier ruling that NHEMA had federally enforceable rights under the Parity Act went unchallenged on appeal and concluded that NHEMA prevailed on the assertion of those rights. The court observed that when Virginia elected not to appeal its ruling on NHEMA's rights under the Parity Act, that ruling "became the law of the case and [became] binding on these proceedings." From the district court's order awarding NHEMA attorneys fees, costs, and expenses, Virginia filed this appeal.

II

Virginia contends first that sovereign immunity precludes an award of attorneys fees against State officers when no violation of the Fourteenth Amendment has been alleged. It argues that, in light of recent Supreme Court jurisprudence, such as *Seminole Tribe v. Florida,* 517 U.S.

44 (1996), the authority of district courts to award attorneys fees against State actors should be reexamined.

But as Virginia recognizes, this argument is squarely at odds with Supreme Court cases allowing awards of attorneys fees against State actors. *See Hutto v. Finney*, 437 U.S. 678, 695 (1978) (holding that because attorneys fees have traditionally been regarded as costs, which have long been awardable against a State, they may be awarded against a State "without regard for the states' Eleventh Amendment immunity"); *Missouri v. Jenkins*, 491 U.S. 274, 279-80 (1989) (reaffirming the holding in *Hutto* and clarifying that an application of § 1988 to the States does not require congressional abrogation of sovereign immunity). Because we lack authority to reconsider the Supreme Court's jurisprudence, we reject Virginia's argument. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions'" (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

III

Virginia next contends that sovereign immunity bars an award of attorneys fees against State officers because the standard used in determining whether to award attorneys fees in a particular case favors private plaintiffs and, therefore, discriminates against the States. Virginia contends that "[c]oncepts of federalism demand that a prevailing plaintiff, such as NHEMA, must be placed on

the same footing which the Supreme Court has established for prevailing State defendants. Thus, attorney's fees should not be awarded absent a showing that a party's position was frivolous, unreasonable, and without foundation."

Again, this argument is at odds with existing Supreme Court precedent. Under current law, a court may award attorneys fees to prevailing *plaintiffs* as a matter of course, but to prevailing *defendants* only if "the plaintiff's action was frivolous, unreasonable, or without foundation." *See Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (citation and internal quotation marks omitted); *see also Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (stating that "a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust" (citation and internal quotation marks omitted)). The Supreme Court has established this differential standard, and, again, we lack the authority to change it.

IV

For its principal argument on appeal, Virginia contends that NHEMA was not a prevailing party on a claim brought pursuant to 42 U.S.C. § 1983 and, therefore, is precluded from recovering attorneys fees under 42 U.S.C. § 1988. It argues that, because our first opinion in this case focused exclusively on preemption and the Supremacy Clause, NHEMA did not prevail under § 1983 because the Supremacy Clause is not a source of substantive individual rights supporting a § 1983 action. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) (noting that the Supremacy Clause is not "a source

of any federal rights" and, therefore, "of its own force, does not create rights enforceable under § 1983" (citation and internal quotation marks omitted)); *Maryland Pest Control Ass'n v. Montgomery County, Maryland*, 884 F.2d 160, 163 (4th Cir. 1989) (per curiam) ("We hold that federal preemption of local ordinances pursuant to the Supremacy Clause is not actionable under Section 1983. Therefore, there can be no award of attorney's fees under Section 1988").

This argument, however, overlooks the nature of NHEMA's complaint, the issues decided by the district court, and the limited review that we conducted in our earlier opinion. NHEMA brought its action under 42 U.S.C. § 1983 explicitly to vindicate rights it asserted were conferred on its members by the Parity Act, a federal statute. It alleged in its complaint that it had rights conferred by the Parity Act and that it was seeking to vindicate those rights in the face of conflicting State law. While NHEMA did assert that the rights created by the Parity Act trumped State law under the Supremacy Clause, its requested relief was to enforce its federal rights under the Parity Act despite conflicting State law. Thus, NHEMA sought to secure a federal right under § 1983.

When the parties filed cross-motions for summary judgment, they explicitly addressed whether the Parity Act conferred enforceable rights on NHEMA and its members. Virginia argued vigorously that no such rights were created, but NHEMA prevailed on that issue when the district court concluded, "the plaintiff has a federally enforceable right under 42 U.S.C. § 1983," applying the three part test in *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509 (1990). The district court reasoned that the test in *Wilder* was satisfied because "(1) nonfederally chartered housing creditors belonging to NHEMA are

intended beneficiaries of the Parity Act, (2) the Parity Act creates a present right to be free of state law, and (3) the judicial remedies being sought are traditional and well established." In addition to concluding that the Parity Act provided NHEMA and its members with rights enforceable under 42 U.S.C. § 1983, the court concluded that the provisions of the Parity Act creating those federal rights preempted Virginia's conflicting statutes – §§ 6.1-330.83 and 6.1-330.85 of the Virginia Code.

In appealing the district court's judgment, Virginia elected not to challenge the district court's conclusion that the Parity Act conferred a cause of action on NHEMA and its members. Rather, it limited its challenge to whether Virginia law was in conflict with the Parity Act. When we disposed of that issue in favor of NHEMA and its members, NHEMA became a prevailing party on its claims brought under the Parity Act and 42 U.S.C. § 1983.

While Virginia suggests by implication that perhaps we should now review the question of whether the Parity Act conferred rights on NHEMA, "[i]t is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand." *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 974 F.2d 502, 505 (4th Cir. 1992) (citations and internal quotation marks omitted). Accepting as the law of the case the conclusions that NHEMA has a federally enforceable right under the Parity Act – a conclusion that we do not review – and that NHEMA sought to enforce that right, we find that this case does not fall within the rule announced in *Golden State Transit* and *Maryland Pest Control*. In *Golden State Transit*, the Supreme Court ultimately concluded that the National Labor Relations Act created a

right to prevent State governmental interference with federally protected labor rights and that therefore 42 U.S.C. §1983 could be employed to enforce that right. 493 U.S. at 108-09. In *Maryland Pest Control*, we concluded that the plaintiff did not have a substantive right secured by a federal statute, determining instead that the case involved a pure Supremacy Clause issue, and that therefore no 42 U.S.C. § 1983 claim could be asserted. *Maryland Pest Control*, 884 F.2d at 163. In the circumstances before us, however, once the district court found that NHEMA had a federally enforceable right under the Parity Act, it correctly determined that NHEMA prevailed on that right through a § 1983 claim and therefore was justified in relying on § 1988 for its award of attorneys fees, costs, and expenses.

V

Finally, Virginia argues that special circumstances were presented in this case that would render an award of attorneys fees to NHEMA unjust. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (stating that a prevailing party should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust" (citation and internal quotation marks omitted)).

Articulating those special circumstances, Virginia asserts first that the nature of NHEMA, a nationwide trade association of mortgage lenders, was a special circumstance weighing against awarding fees because NHEMA can afford to hire its own lawyers. Second, Virginia asserts that the nature of the case, a nonconstitutional case with its own financial incentives for NHEMA, weighed against awarding fees. Third, Virginia asserts

that the nature of the defense – that "it would have been *irresponsible* for the Commonwealth to have abandoned these [Virginia] statutes enacted through the democratic process – without testing their validity through a vigorous defense in the courts" – weighed against awarding fees in this case.

Because the special circumstances exception is narrow and the special circumstances claimed here are not extraordinary, we conclude that none of them compel a finding that the district court abused its discretion by not applying the exception. *See Doe v. Board of Educ. of Baltimore County*, 165 F.3d 260, 264 (4th Cir. 1998) (recognizing that "this 'special circumstances' exception is very 'narrowly limited'" and that "[o]nly on rare occasions does a case present such circumstances").

For the foregoing reasons, the order of the district court awarding attorneys fees, costs and expenses to NHEMA in the amount of $79,750 is

AFFIRMED

JUDGMENT

FILED: March 8, 2002

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 01-1631
CA-99-398-3

NATIONAL HOME EQUITY
MORTGAGE ASSOCIATION

Plaintiff – Appellee

v.

E. JOSEPH FACE, JR., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission; SUSAN E. HANCOCK, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission

Defendants – Appellants

MARK L. EARLEY

Movant

Appeal from the United States District Court for the Eastern District of Virginia at Richmond

---

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

/s/ Patricia S. Connor
CLERK

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

April 16, 2002

MANDATE

TO: Clerk, District Court/Agency

FROM: Lisa Jernigan
Deputy Clerk

RE: 01-1631 Natl Home Equity v. Face
CA-99-398-3

HEREWITH IS THE MANDATE OF THIS COURT, ISSUED THIS DATE, ON THE JUDGMENT ENTERED BY THE COURT ON 3/8/02.

[ ] Order and Certified Copy of Judgment
[X] Opinion and Certified Copy of Judgment
[X] Order on Costs
[ ] Order dismissing appeal R42(b) or Local Rule R45
[ ] Other: _____
[ ] The record has been retained for use in case number _____

A copy of the judgment is enclosed to counsel/pro se parties.

cc: William Harrison Baxter II
Earle Duncan Getchell Jr.
Alice Ann Berkebile
Judith Williams Jagdmann
William Henry Hurd
Martha B. Brissette

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1631
CA-99-398-3

NATIONAL HOME EQUITY
MORTGAGE ASSOCIATION

Plaintiff – Appellee

v.

E. JOSEPH FACE, JR., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission; SUSAN E. HANCOCK, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission

Defendants – Appellants

MARK L. EARLEY

Movant

ORDER

(Filed April 16, 2002)

Appellants have filed a motion to stay the mandate pending application to the United States Supreme Court for a writ of certiorari.

The Court denies the motion.

Entered at the direction of Judge Niemeyer, with the concurrence of Judge Luttig and Judge King.

For the Court,
/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Plaintiff,

v. Civil Action Number: 3:99CV398

E. JOSEPH FACE, JR., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission,

SUSAN E. HANCOCK,
Deputy Commissioner, Consumer Finance,
Bureau of Financial Institutions,
Virginia State Corporation Commission,

Defendants,

MARK L. EARLEY,
Attorney General of Virginia,

Intervenor-Defendant.

MEMORANDUM OPINION

This matter is before the Court on the plaintiff's motion for attorney's fees, costs and expenses. The motion follows the Court granting the plaintiff's motion for summary judgment and denying the defendants' motions for summary judgment in a Memorandum Opinion dated September 9, 1999, which was followed by an appeal to the United States Court of Appeals for the Fourth Circuit.

The case involved the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801-06 ("the Parity Act"), and whether it preempted Virginia laws limiting prepayment penalties. National Home Equity Mortgage Association ("NHEMA" or "plaintiff") filed a motion for summary judgment asserting that the Parity Act preempted Virginia laws. Defendants E. Joseph Face, Jr. and Susan E. Hancock, from the Virginia State Corporation Commission ("SCC defendants") and intervenor-defendant Mark L. Earley, Attorney General of Virginia ("the Attorney General") also filed motions for summary judgment, both asserting that the Parity Act did not apply to Virginia's statutory prepayment penalty limits. The Court issued a Memorandum Opinion and Order granting the plaintiff's motion and denying the defendants' motions. *National Home Equity Mortgage Ass'n v. Face*, 64 F. Supp. 584 (E.D. Va. 1999). The defendants and the intervenor-defendant then appealed to the United States Court of Appeals for the Fourth Circuit. The matter was argued on October 30, 2000 and decided on February 7, 2001. The United States Court of Appeals affirmed the district court by published opinion. *National Home Equity Mortgage Ass'n v. Face*, 239 F.3d 633 (4th Cir. 2001).

The parties have agreed that, if the Court grants the motion for attorney's fees, costs, and expenses, the amount to be awarded the plaintiff is $79,750.00 in attorney's fees, costs and expenses.

The plaintiff moves for attorney's fees based on 42 U.S.C. § 1988, arguing that because the Court granted its summary judgment motion, it is the prevailing party under 42 U.S.C. § 1983. Ordinarily, a prevailing party in a section 1983 action "should . . . recover an attorney's fee unless special circumstances would render such an award

unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Section 1988 states in relevant part that "[i]n any action or proceeding to enforce a provision of [§ 1983] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ."

The defendants and intervenor-defendant raise several arguments that NHEMA is not entitled to attorney's fees or costs. First, they argue that *Maryland Pest Control Ass'n v. Montgomery County, Maryland*, 884 F.2d 160 (4th Cir. 1989) (per curiam), *cert. denied*, 494 U.S. 1056 (1990), mandates that the plaintiff not be awarded attorney's fees and costs. In *Maryland Pest Control*, the Fourth Circuit framed the issue as: "the question in this case is whether the Associations' successful argument, grounded in the Supremacy Clause, that FIFRA preempted local laws will support a civil rights action under Section 1983 which would entitle them to attorney's fees under Section 1988." 884 F.2d at 162. The Fourth Circuit noted that several circuits, including the Ninth, the Tenth, and the Seventh, have held that the Supremacy Clause is not a source of substantive individual rights that could support an action brought pursuant to Section 1983. *Id.* at 162-163.

However, in the present case, the Court did not hold that the Supremacy Clause created rights enforceable under section 1983. Instead, the Court applied the three-part test set forth in *Wilder v. Virginia Hosp. Ass'n.*, 496 U.S. 498, 509 (1990), and specifically ruled that NHEMA "has a federally enforceable right under 42 U.S.C. § 1983," the right "to be free of state law." 64 F. Supp. at 591. Therefore, the exception implied in the final paragraph of *Maryland Pest Control* – that if an action is maintainable

under section 1983 as a suit to enforce statutory rights, then there can be an award of attorney's fees under section 1988 – is applicable. An examination of the most recent cases addressing the three-part test to determine whether a statute gives rise to a federal right enforceable under section 1983 supports the Court's previous determination. *See Blessing v. Freestone*, 520 U.S. 329 (1997); *Doe v. Broderick*, 225 F.3d 440 (4th Cir. 2000).

In addition, this decision of the Court was not challenged on appeal by the defendants or the intervenor-defendant. The Court has reviewed the briefs the parties filed in the Fourth Circuit, as well as the opinion of the Fourth Circuit. The appellants failed to appeal the Court's ruling that NHEMA has a federally enforceable right under section 1983. Accordingly, that ruling became the law of the case and is binding in these proceedings. *See Suel v. Secretary of Health and Human Services*, 192 F.3d 981, 985-86 n.2 (Fed. Cir. 1999) ("It is particularly appropriate to invoke law of the case principles when a party has decided not to appeal an issue and further proceedings are conducted in reliance on that decision.").

Defendants and intervenor-defendant make additional arguments that the plaintiff is not entitled to attorney's fees, arguing that such an award is barred by sovereign immunity, under *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and arguing that there are special circumstances in this case that render an award of attorney's fees unjust, pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Court disagrees with defendants' arguments, finding that they are without merit.

An appropriate Order shall issue.

DATE: April 5, 2001

/s/ Richard L. Williams
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Plaintiff,

v. Civil Action Number: 3:99CV398

E. JOSEPH FACE, JR.,
Commissioner of Financial Institutions,
Bureau of Financial Institutions,
Virginia State Corporation Commission,

SUSAN E. HANCOCK
Deputy Commissioner, Consumer Finance,
Bureau of Financial Institutions,
Virginia State Corporation Commission,

Defendants,

MARK L. EARLEY,
Attorney General of Virginia,

Intervenor-Defendant.

FINAL JUDGMENT ORDER

For the reasons stated in the accompanying Memorandum Opinion, the Court GRANTS plaintiff's motion for attorney's fees, and expenses and hereby ENTERS JUDGMENT for the plaintiff against the defendants, Face and Hancock, in the amount of $79,750.00.

It is so ORDERED.

Let the Clerk send a copy of this Final Judgment Order and the accompanying Memorandum Opinion to all counsel of record.

DATE: April 5, 2001

/s/ Richard L. Williams
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

NATIONAL HOME EQUITY
MORTGAGE ASSOCIATION,

Plaintiff.

v.

E. JOSEPH FACE, JR., et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

Case Number: 3:99CV398

_____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered a verdict.

__X__ **Decision by Court.** This action came to hearing before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court GRANTS plaintiff's motion for attorney's fees, costs, and expenses and hereby ENTERS JUDGMENT for the plaintiff against the defendants, Face and Hancock, in the amount of $79,750.00.

DATE: April 5, 2001

Norman H. Meyer, Jr.
Clerk

/s/ _____
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Plaintiff,

v.

E. JOSEPH FACE, JR., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission,

SERVE:
1300 East Main Street
Suite Eight Hundred
Post Office Box 640
Richmond, VA 23218-0640

SUSAN E. HANCOCK, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

SERVE:
1300 East Main Street
Suite Eight Hundred
Post Office Box 640
Richmond, VA 23218-0640

Defendants.

Civil Action No. 399CV898

VERIFIED COMPLAINT FOR DECLARATORY RELIEF AND PRELIMINARY AND PERMANENT INJUNCTIONS FOR VIOLATION OF 42 U.S.C. § 1983

(Filed Jun. 1, 1999)

Plaintiff National Home Equity Mortgage Association ("NHEMA") states the following as its Verified Complaint against Defendants E. Joseph Face, Jr., Commissioner of Financial Institutions, Bureau of financial Institutions, Virginia State Corporation Commission, and Susan E. Hancock, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission:

THE PARTIES

1. National Home Equity Mortgage Association ("NHEMA") is the largest national trade association focusing primarily upon the home equity lending market. Members of this voluntary trade association include banks, mortgage lending corporations, secured equity lenders, law firms, title insurers, consulting firms, and appraisal services corporations. NHEMA membership includes entities that are currently licensed by the Bureau of Financial Institutions, Virginia State Corporation Commission, to conduct business in the Commonwealth of Virginia, and that also qualify as housing creditors under the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801-06, (the "Parity Act") and are thus subject to its provisions.

2. E. Joseph Face, Jr., is Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission. He is responsible for the division that administers state laws regulating financial

services institutions licensed by the Bureau. He executes and enforces state policy initiatives directly affecting NHEMA members licensed to conduct business in the Commonwealth of Virginia.

3. Susan E. Hancock is Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission. She is responsible for the administrative section which examines and supervises the operations of financial services institutions (except for state-chartered banks and credit unions) licensed by the Bureau of Financial Institutions. She executes and enforces state policy initiatives directly affecting NHEMA members licensed to conduct business in the Commonwealth of Virginia.

JURISDICTION AND VENUE

4. Jurisdiction is conferred upon the Court by 28 U.S.C. § 1331 and by 28 U.S.C. §§ 1343(3)-(4) in this suit complaining of the denial of federal rights under color of state law forbidden by 42 U.S.C. § 1983.

5. Authority to order a reasonable award of attorneys' fees and costs is conferred by 42 U.S.C. § 1988.

6. Declaratory relief is proper under 28 U.S.C. § 2201.

7. Venue is proper in this Court under 28 U.S.C. § 1391(b).

GROUNDS FOR RELIEF

Alternative Mortgage Transactions

8. An alternative mortgage transaction describes a residential-based loan or credit sale in which the lender

may raise the interest rate, renegotiate the finance charge, or implicitly adjust the mortgage rate by allowing debt to mature faster than anticipated in the original amortization schedule. 12 U.S.C. §§ 3802(1)(A)-(B). The definition of an alternative mortgage transaction also includes the changing of any other term or variation not common to traditional fixed-rate or fixed-term transactions. 12 U.S.C. § 3802(1)(C); 12 C.F.R. § 560.2(b)(5).

9. Congress has found that such mortgages are essential in providing an adequate supply of credit secured by residential property to those demanding such credit. 12 U.S.C. § 3801(a)(2).

10. The National Credit Union Administration, Comptroller of the Currency, and Director of the Office of Thrift Supervision have all recognized the significance and value of such mortgages by adopting regulations permitting federally chartered banking institutions to enter this industry. 12 U.S.C. § 3801(a)(3).

11. Federally chartered banking institutions thus engage in direct competition with smaller state regulated establishments to make, purchase, and enforce such mortgages on the open market.

The Alternative Mortgage Transaction Parity Act of 1982

12. In the early 1980s, Congress determined that federal regulations governing such mortgages heavily favored federally chartered banking institutions. 12 U.S.C. § 3801(a)(2).

13. To eliminate this discriminatory impact, Congress enacted the Parity Act and thereby attempted to

create a level playing field for all financial services institutions that either supplied or wanted to supply such mortgages by affording housing creditors authority to make, purchase, and enforce these mortgages. 12 U.S.C. § 3801(b).

14. The Parity Act defines a housing creditor in relevant part as "any person who regularly makes loans, credit sales, or advances secured by interests in properties . . . or any transferee of them." 12 U.S.C. § 3802(2)(C)-(D).

15. The Parity Act provides that all housing creditors have general authority to make, purchase, and enforce alternative mortgage transactions in accordance with regulations issued by the Director of the Office of Thrift Supervision governing federal savings and loan associations. 12 U.S.C. § 3803(a)(3).

16. The Director of the Office of Thrift Supervision has rulemaking authority pursuant to 12 U.S.C. §§ 1463(a), 1464(a) to regulate federally chartered savings and loan organizations. The Director of the Office of Thrift Supervision has given federal savings and loan organizations federal rights to charge prepayment penalties without regard to state laws. 12 C.F.R. §§ 560.2(a), (b)(5).

Mandatory Requirements for Opting Out of The Parity Act

17. Congress expressly afforded each state the opportunity under 12 U.S.C. § 3804(a) to opt out of the preemption provisions of the Parity Act between October 15, 1982, and October 15, 1985, by enacting, or adopting by referendum or constitutional amendment, a new law, stating explicitly and by its terms that the state opting out

did not want the Parity Act to preempt state laws regarding alternative mortgage transactions.

Failure of the Commonwealth of Virginia to Opt Out Gives NHEMA Members Qualifying as Housing Creditors under the Parity Act Federal Rights to Charge Prepayment Penalties on Alternative Mortgage Transactions Made, Purchased, and Enforced in the Commonwealth of Virginia

18. The Commonwealth of Virginia failed to enact or adopt by referendum or constitutional amendment any such law stating explicitly and by its terms that it did not want the Parity Act to preempt Virginia laws regarding alternative mortgage transactions made, purchased, and enforced within that state.

19. Through acts that were not passed within the required time period and that do not contain any reference to the Parity Act, the Virginia General Assembly purports to limit and regulate prepayment penalties contrary to the Parity Act. 1987 Va. Acts ch. 622 (codifying Va. Code Ann. §§ 6.1-330.83, .85).

NHEMA Members Have Federal Rights to Charge Prepayment Penalties on Alternative Mortgage Transactions in the Commonwealth of Virginia

20. Pursuant to 12 U.S.C. § 3803(a)(3) and 12 C.F.R. §§ 560.2(a), (b)(5), every NHEMA member subject to the provisions of the Parity Act and licensed by the Bureau of Financial Institutions, Virginia State Corporation Commission, has federal rights to charge prepayment penalties for every alternative mortgage transaction made, purchased, or enforced in the Commonwealth of Virginia without

regard to state law. These federal rights preempt any limits on prepayment penalties enacted under Virginia state law. Va. Code Ann. §§ 6.1-330.83, .85.

The Bureau of Financial Institutions, Virginia State Corporation Commission, Through Defendants, is Illegally Revoking Under Color of State Law NHEMA Members' Federal Rights to Charge Prepayment Penalties on Alternative Mortgage Transactions

21. NHEMA members who qualify as housing creditors under the Parity Act and conduct business within the Commonwealth of Virginia are automatically licensed by the Bureau of Financial Institutions, Virginia State Corporation Commission, to make, purchase, and enforce alternative mortgage transactions within the Commonwealth of Virginia. Va. Code Ann. § 6.1-410. Their rights to charge prepayment penalties in accordance with the Parity Act continue in perpetuity because the Commonwealth of Virginia never opted out of its preemption provision in the form or manner described in 12 U.S.C. § 3804(a).

22. In the April 1999 edition of the official newsletter *The Compliance Connection: Regulatory News for Virginia Mortgage and Consumer Finance Licensees,* Defendants announced or permitted to be announced that the Parity Act does not preempt Virginia laws limiting prepayment penalties for alternative mortgage transactions. This article is attached as Exhibit A.

23. In stating its policy, the Bureau of Financial Institutions, acting through or on the authority of Defendants, referred to "numerous opinion letters from attorneys, along with copies of opinions from the Office of Thrift

Supervision's counsel and various states' Attorneys General which opine that the [Parity Act] preempts Virginia law."

24. The announcement continued: "[t]he Bureau does not agree with these opinions."

25. Speaking for the Bureau of Financial Institutions, the announcement stated that the Bureau will "continue to cite [entities charging prepayment penalties in excess of state limits on alternative mortgage transactions for] violations of Virginia statutes relating to prepayment penalties." *See* Va. Code Ann. §§ 6.1-330.83, .85.

26. Speaking for the Bureau of Financial Institutions, the announcement stated that the Bureau will require such entities "to refund prepayment penalties collected, in excess of the state law limits."

27. Speaking for the Bureau of Financial Institutions, the announcement stated that such entities must notify "current borrowers so they will be aware that any higher penalty cannot be enforced." Moreover, "[a] copy of the notification must be made a part of the permanent loan file, and investors who have purchased loans providing for penalties in excess of the penalty set forth in the Virginia Code must also be notified."

28. Speaking for the Bureau of Financial Institutions, the announcement stated that exercise of the federal right to charge prepayment penalties without regard to state law subjects housing creditors to license revocation.

29. Speaking for the Bureau of Financial Institutions, the announcement stated that charging prepayment penalties in excess of state limits will cause the Bureau to refer such entities to the Office of the Attorney General for

investigation of violations of Va. Code Ann. §§ 6.1-330.83, .85 and for potential legal action pursuant to Va. Code Ann. § 6.1-430.

30. Defendants are currently directing and authorizing the Bureau to enforce or threaten to enforce all of these punitive measures against NHEMA members who are lawfully invoking their federal rights to charge prepayment penalties under the Parity Act.

31. The Supremacy Clause (U.S. Const. art. VI, § 2) guarantees that federal laws made under the authority of the United States shall prevail over contrary state laws.

32. The Parity Act creates immediately enforceable rights under 42 U.S.C. § 1983 and Congress has not foreclosed the enforcement of these rights through a civil action filed under 42 U.S.C. § 1983. These rights are substantial, and not too vague or amorphous so as to preclude judicial enforcement through 42 U.S.C. § 1983.

33. NHEMA members subject to the Parity Act have individual standing because they face real and present harm in the form of Defendants' order to notify borrowers and investors that no negotiated prepayment penalty in excess of state limits is enforceable and through the announced intention to punish entities for their past and future exercise of federal rights. NHEMA as a voluntary trade association has standing to assert these rights on behalf of its members.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for the following relief:

1. Appropriate declaratory relief that Defendants' actions are depriving NHMEA members of their federal rights under color of state law.

2. Appropriate injunctive relief requiring Defendants to immediately cease enforcement of punitive measures against NHEMA members for exercising their federal rights to charge prepayment penalties in excess of state limits on alternative mortgage transactions.

3. An award of reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

4. Such other relief as the Court may deem appropriate.

Respectfully submitted,

NATIONAL HOME EQUITY
MORTGAGE ASSOCIATION

By: /s/ E. Duncan Getchell, Jr.
Counsel

E. Duncan Getchell, Jr. (V.S.B. No. 14156)
Robert L. Hodges (V.S.B. No. 31396)
William H. Baxter II (V.S.B. No. 42587)
McGUIRE, WOODS, BATTLE & BOOTHE LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030
(804) 775-4319

Counsel for Plaintiff National Home
Equity Mortgage Association

VERIFICATION PURSUANT TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 1st day of June, 1999 at Washington, D.C.

/s/ [Illegible]

EXHIBIT A

The Compliance Connection

State Corporation Commission – Bureau of Financial Institutions Regulatory News for Virginia Mortgage and Consumer Finance Licensees **APRIL 1999**

Federal Preemption of Virginia's Prepayment Penalty Laws:

The major topic lately has been the debate over whether the Alternative Mortgage Transaction Parity Act (AMTPA) preempts Virginia laws that place limits on prepayment penalties. The Bureau has received numerous opinion letters from attorneys, along with copies of opinions from the Office of Thrift Supervision's counsel and various states' Attorneys General which opine that the AMTPA preempts Virginia law. The Bureau does not agree with these opinions.

We believe Congress' intention in passing the AMTPA was to authorize, in the case of "housing creditors', the OTS

to override state laws which prevented the making of mortgage loans having certain features not common to conventional mortgage loans. We understand the AMTPA gave housing creditors the right to enter into alternative mortgage loan transactions in accordance with OTS regulations only "to the extent that such regulations are authorized by rulemaking authority granted to [the OTS] . . . under laws other than this section (12 U.S.C. §3803)." The prepayment provisions of Virginia law do not prevent or impede creditors from making adjustable rate loans or other non-conventional mortgage loans (balloon, shared equity loans). They never have.

In our opinion, in §3802(1)(c) of the AMTPA, Congress explicitly restricted the OTS's authority to preemption of only such state laws as related to features " . . . not common to traditional fixed-rate, fixed-term transactions . . . " The Virginia statutes applicable to prepayment penalties, §§6.1-330.83 and 6.1-330.85 of the Code of Virginia, govern a longstanding feature of conventional mortgage lending which Congress left to state law under §501(b)(4) of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA). To express the matter more simply, our view is that federal law governs unconventional features of "alternative mortgage transactions", while state law governs conventional features of such loans, as Congress intended.

In addition, under § 501(b)(4) of DIDMCA, the states had an unlimited period of time within which to "opt out" of federal preemption of "points and other charges" connected with federally-related mortgage loans, and no particular formality was required. Virginia opted out as authorized by Congress by amendment and recodification of its money and interest laws in 1987, including

statutes related to points, late charges, prepayment penalties, etc. permitted in connection with mortgage loans. Therefore, it was unnecessary to opt out of federal preemption under AMTPA.

Bureau examiners will continue to cite violations of Virginia statutes relating to prepayment penalties. Licensees found in violation will be required to refund prepayment penalties collected, in excess of the state law limits. In addition, notification of Virginia's limit on prepayment penalties must be provided to current borrowers so they will be aware that any higher penalty cannot be enforced. A copy of the notification must be made a part of the permanent loan file, and investors who have purchased loans providing for penalties in excess of the penalty set forth in the Virginia Code must also be notified.

In addition to possible revocation of license, such violations can be referred to the Attorney General's office for investigation pursuant to Virginia Code §6.1-430.

No. 01-1827

Supreme Court, U.S.
FILED
JUL 17 2002
OFFICE OF THE CLERK

In The Supreme Court of the United States

E. JOSEPH FACE, JR., in his official capacity as Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission, and SUSAN E. HANCOCK, in her official capacity as Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

Petitioners,

v.

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

E. DUNCAN GETCHELL, JR., *Counsel of Record*
ROBERT L. HODGES
WILLIAM H. BAXTER, II
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 775-1000 (Telephone)
(804) 698-2061 (Facsimile)

Counsel for Respondent.

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Should the Court overrule its decisions in *Hutto v. Finney*, 437 U.S. 678 (1978), and *Missouri v. Jenkins*, 491 U.S. 274 (1989), and hold instead that when a plaintiff prevails in an action against state officials for injunctive and declaratory relief pursuant to 42 U.S C. § 1983, the doctrine of sovereign immunity bars an award of attorney's fees under 42 U.S.C. § 1988?

2. Should the Court overrule its decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (construing 42 U.S.C. § 1988 to authorize awards of reasonable attorney's fees as part of costs to prevailing plaintiffs, but requiring prevailing defendants to show that the suit was frivolous or brought in bad faith), and replace that rule with an "even-handed" approach to the award of fees, even though the legislative history clearly shows that Congress intended the construction adopted by the Court?

THE PARTIES

The National Home Equity Mortgage Association is a national trade association focusing primarily upon the home equity lending market. Members of this voluntary trade association include banks, mortgage lending corporations, secured equity lenders, law firms, title insurers, consulting firms, and appraisal services corporations. Its membership includes entities that are licensed by the Bureau of Financial Institutions, Virginia State Corporation Commission, to conduct business in the Commonwealth of Virginia, and that also qualify as housing creditors under the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801-06.

E. Joseph Face, Jr. is the Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission. He is responsible for the division that administers state laws regulating financial services institutions licensed by the Bureau. He executes and enforces state policy initiatives directly affecting NHEMA members licensed to conduct business in the Commonwealth of Virginia who also qualify as housing creditors under the Parity Act.

Susan E. Hancock is the Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission. She is responsible for the administrative section that examines and supervises the operations of financial services institutions (except for state-chartered banks and credit unions) licensed by the Bureau. She executes and enforces state policy initiatives directly affecting NHEMA members licensed to conduct business in the Commonwealth of Virginia who also qualify as housing creditors under the Parity Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, respondent National Home Equity Mortgage Association hereby discloses that it is a national trade association as noted *supra*, that it has no parent corporation, and that there is no publicly held company that owns 10% or more of its stock.

TABLE OF CONTENTS

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED i

THE PARTIES ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

COUNTERSTATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD BE DENIED 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

1. The Court Has Consistently .. Held that Congress Abrogated ..... the States' Immunity Against Fee Awards Under § 1988, ... and Subsequent Decisions Have Not Altered That Conclusion 4

2. The States' Historical Liability for Costs in Federal Court Provides Sufficient Basis for .....the Award of Fees Apart from Any Considerations of Immunity. 9

3. Because Petitioners Seek Wholesale Overruling of the Court's Prior Decisions, Considerations of *Stare Decisis* Weigh Heavily Against Granting the Writ On the Remaining Argument Based on the Rule in *Hensley v. Eckerhart*.....13

CONCLUSION 15

TABLE OF AUTHORITIES

FEDERAL CASES

Alden v. Maine, 527 U.S. 706 (1999) 5, 15

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 9-12

Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796) 10

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 5, 7, 15

Buckhannon Board and Care Home, Inc. v. West Va. Department of Health and Human Resources, 532 U.S. 598 (2001) 13-14

Dellmuth v. Muth, 491 U.S. 223 (1989) 5, 7, 15

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 13

Hanrahan v. Hampton, 446 U.S. 754 (1980) 13-14

Hensley v. Eckerhart, 461 U.S. 424 (1983) ..... *passim*

Hilton v. South Carolina Public Railways Commission, 502 U.S. 197 (1991) 13

Hutto v. Finney, 437 U.S. 678 (1978) ..... *passim*

Kentucky v. Graham, 473 U.S. 159 (1985) 6

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 4-5

Maher v. Gagne, 448 U.S. 122 (1980) 13

Missouri v. Jenkins, 491 U.S. 274 (1989) ..... *passim*

Morse v. Republican Party of Va., 517 U.S. 186 (1996), *on remand*, 972 F. Supp. 355 (W.D. Va. 1997) 4, 14

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) 5, 15

Supreme Court of Va. v. Consumers Union of the United States, Inc., 446 U.S. 719 (1980) 6

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989) 13

FEDERAL STATUTES

12 U.S.C. § 3801 *et seq.* 1

12 U.S.C. § 3803(a)(3) 1

28 U.S.C. § 1923(a) 11

42 U.S.C. § 1981 14

42 U.S.C. § 1982 14

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 ..... *passim*

42 U.S.C. § 2000d 14

STATE STATUTES AND LEGISLATIVE HISTORY

I Rev. Code of Va. (1819), ch. 76, §§ 14-17 11

I Rev. Code of Va. (1819), ch. 76, §§ 15 11

Va. Code Ann. § 6.1-330.83 1

Va. Code Ann. § 6.1-330.85 1

Va. Code Ann. § 17.1-624 11

MISCELLANEOUS

7 Hening's Statutes at Large 400-01 11

COUNTERSTATEMENT OF THE CASE

Respondent NHEMA departs from petitioners' Statement of the Case when it asserts that NHEMA sought to have Va. Code §§ 6.1-330.83 and 6.1-330.85 declared unconstitutional. Petition, at 4. Both statutes are constitutional exercises of the Commonwealth of Virginia's police power, when properly applied. NHEMA's suit sought, successfully, to restrain enforcement of these state statutes to invalidate home mortgage prepayment penalty provisions permitted under the federal Alternative Mortgage Transaction Parity Act, 12 U.S.C. § 3801 *et seq*. The Parity Act permits lenders subject to its provisions to make, purchase, and enforce mortgages conforming to regulations issued under the Act according to the terms of the instruments. 12 U.S.C. § 3803(a)(3). The officials sued in this case in their official capacities had indicated their intention to enforce these state statutes against lenders despite the lenders' availing themselves of their federal right under preemptive effect of federal law. *See* Petition, at App. 34 – App. 36.

REASONS WHY THE WRIT SHOULD BE DENIED

Introduction and Summary of the Argument

Petitioners suggest that were the cases of *Hutto v. Finney*, 437 U.S. 678 (1978), and *Hensley v. Eckerhart*, 461 U.S. 424 (1983), to come before the Court today, the Court "likely . . . would rule in exactly the opposite manner." Petition, at 2. NHEMA responds that a correct reading of those cases and the Court's subsequent decisions refutes that contention. Unless the Court is prepared to overrule *Hutto* and *Hensley*, and the cases, myriad in number, that depend

upon their reasoning, it should deny the writ in this case. Indeed, adoption of the rules argued for by petitioners would go beyond overruling *Hutto*. It would change the operation of The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ("§ 1988"), fundamentally.

The petition in this case recycles arguments that the Court has rejected over the years. Petitioners claim that the Court's jurisprudence of attorney's fees under § 1988, at least as it applies to states or state officials, has been overruled by the Court's recent decisions involving the Eleventh Amendment. Therefore, petitioners assert, a revised interpretation of § 1988 is required to avoid constitutional infirmity. Petition, at 1 n.1.

The crux of petitioners' argument is that the States' sovereign immunity protects them against an award of attorney's fees. Petitioners claim that immunity can only be abrogated by Congress acting under its enforcement authority under § 5 of the Fourteenth Amendment, and then only for Fourteenth Amendment-based claims and only by a "clear statement" of such abrogation in the language of the statute itself.

Petitioners assert further that the States' immunity precludes Congress from treating the States less favorably that other litigants. Consequently, they assert, the rule in *Hensley v. Eckerhart*, which treats prevailing plaintiffs under § 1988 differently from prevailing defendants, cannot constitutionally be applied to States.

The arguments petitioners advance ought to fare no better on this occasion than when they were rejected by the Court in the past. It is beyond reasonable dispute that Congress has validly abrogated the States' immunity against awards of attorney's fees ancillary to prospective relief against state officials. It is also beyond reasonable dispute

that Congress had sufficient authority to permit recovery of such fee awards as part of costs, apart from any considerations of State immunity.

The petitioners' arguments do not undercut, either factually or legally, either basis of the Court's holding in *Hutto* – that Congress abrogated the States' Eleventh Amendment immunity in enacting § 1988, and that States have been liable historically for awards of costs to prevailing opponents without regard to the Eleventh Amendment. *Hutto* rejected the arguments made here in 1978. *Missouri v. Jenkins* rejected the same arguments in 1989 when the petitioners there asserted that further development of the Court's Eleventh Amendment jurisprudence had changed the law. In *Missouri v. Jenkins*, 491 U.S. at 280, the Court held that the Eleventh Amendment simply did not apply to an award of attorney's fees ancillary to a grant of prospective relief.

Now, petitioners ask the Court to decide that some important threshold has been passed that was not passed in 1978 or 1989. But the Court has consistently held that Congress intended to and did abrogate the States' Eleventh Amendment immunity against awards of attorney's fees under § 1988. Just as consistently, it has held that the States' historical liability for costs is an adequate basis by itself for fees to be awarded, apart from any considerations of State immunity. After *Missouri v. Jenkins*, petitioners' arguments grounded in the Eleventh Amendment are completely misdirected.

Furthermore, because it is clear that the Eleventh Amendment has no application to the issues before the Court, the questions presented are reduced to matters of statutory construction, where considerations of *stare decisis* have the greatest force. The Court cannot reverse a body of law dating back to *Hutto* in 1978, and even further, without

transgressing the important principles embodied in the doctrine of *stare decisis*.

Finally, petitioners' assertion that *Hensley* subjects States to a discriminatory rule is not well-taken. States are not discriminated against *qua* States because their employees acting in their official capacities are not the only state actors subject to § 1983. Many defendants subject to § 1983 and the other statutes triggering liability under § 1988 are not state officials at all, and the award of fees against them is not an award against the State. *See, e.g.*, *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996), *on remand*, 972 F. Supp. 355 (W.D. Va. 1997) (*mem.*).

ARGUMENT

1. The Court Has Consistently Held that Congress Abrogated the States' Immunity Against Fee Awards Under § 1988, and Subsequent Decisions Have Not Altered That Conclusion.

Petitioners advance the same argument made in *Hutto*, that the States have sovereign immunity that bars liability for attorney's fees under § 1988, and absent a clear and unmistakable intent to abrogate that immunity by Congress acting pursuant to its enforcement powers under § 5 of the Fourteenth Amendment, the Eleventh Amendment bars any such relief in federal court. *Hutto* rejected that argument. 437 U.S. at 693-95. Nevertheless, petitioners claim that the development of the "clear statement rule" after *Hutto* undermines its reasoning. The Court has already rejected the same argument in 1989 in *Missouri v. Jenkins*, 491 U.S. at 279-80, a case not distinguished, or even cited, by petitioners. Moreover, the Court's recent citation of *Hutto* with approval, *Landgraf v. USI Film Prods.*, 511 U.S.

244, 277 (1994), shows that a majority of the present Court regard *Hutto* as settled law.

Petitioners advance the same argument again, presumably asserting that *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44 (1996), and *Alden v. Maine*, 527 U.S. 706 (1999), accomplished what the Court held that *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), and *Dellmuth v. Muth*, 491 U.S. 223 (1989), did not when it decided *Missouri v. Jenkins*.

As relevant here, *Hutto* involved a challenge to an award of attorney's fees under § 1988. The Court held that when Congress enacted § 1988, it undoubtedly intended to exercise its plenary power to set aside the States' immunity from retroactive relief and to authorize fee awards payable by the States when their officials are sued in their official capacities. 437 U.S. at 694. The Court said:

> The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions; indeed, the Act primarily applies to laws passed specifically to restrain state action. *See, e.g.*, 42 U.S.C. § 1983.

Id. The Court went on to observe that the legislative history was equally plain. *Id.* Congress stated its specific intent that fee awards would be collected directly from the official in his official capacity, from the funds of his agency or funds under his control, or from the State or local government, regardless whether it was named as a party. *Id.* (citing S. Rep. No. 94-1011, at 5 (1976), *reprinted at* 1976 U.S.C.C.A.N. 5908, 5913). The Court also noted that Congress rejected at least two attempts to amend the Act

and immunize sate and local governments from fee awards. *Id.*

The Attorney General of Arkansas argued that these plain indications of legislative intent were not enough. *Id.* Instead, he argued, Congress must enact express statutory language making the States liable if it wishes to abrogate their immunity. The attorney general pointed out, like petitioners here, that the Court had refused to impose retroactive liability on States in the absence of an extraordinarily explicit statutory mandate. But the Court held that such cases concerned retroactive liability for prelitigation conduct, rather than expenses incurred in litigation seeking only prospective relief. 437 U.S. at 695. In that context, *Hutto* addressed directly the clear statement argument and rejected it.

Two years later, the Court considered the liability of the Supreme Court of Virginia and its Chief Justice for attorney's fees under § 1988. *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719 730-39 (1980). The Court said: "We held in *Hutto v. Finney*, *supra*, that Congress intended to waive whatever Eleventh Amendment immunity would otherwise bar an award of attorney's fees against state officers . . . based on express legislative history indicating that Congress intended [§ 1988] to abrogate Eleventh Amendment immunity." *Id.* at 738. In *Kentucky v. Graham*, 473 U.S. 159, 170 (1985), a unanimous Court reaffirmed *Hutto*'s holding that when a State has been prevailed against for relief on the merits in a § 1983 action, fees are available from the State under § 1988.

Then, in *Missouri v. Jenkins*, the Court again confronted the argument that the language of § 1988 was inadequate under the clear statement rule. The *Missouri v. Jenkins* petitioners relied on the Court's further explication

of the clear statement doctrine in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985), and *Dellmuth v. Muth*, 491 U.S. 223 (1989). While specifically noting that the petitioners relied on those cases, 491 U.S. at 279, the Court nevertheless reaffirmed its holding in *Hutto* that the Eleventh Amendment immunity of the States was abrogated by Congressional enactment of the 1976 amendment to § 1988. The Court said:

> The flaw in this argument lies in its misreading of the holding of *Hutto*. It is true that in *Hutto* we noted that Congress could, in the exercise of its enforcement power under § 5 of the Fourteenth Amendment, set aside the States' immunity from retroactive damages, and that Congress intended to do so in enacting § 1988. But we also made clear that the application of § 1988 to the States did not depend on congressional abrogation of the States' immunity. We did so in rejecting precisely the 'clear statement' argument that Missouri now suggests has undermined *Hutto* . . . .
>
> The holding of *Hutto*, therefore, was not just that Congress had spoken sufficiently clearly to overcome Eleventh Amendment immunity in enacting § 1988, but rather that the Eleventh Amendment *did not apply* to an award of attorney's fees ancillary to an grant of prospective relief. That holding is unaffected by our subsequent jurisprudence concerning the degree of clarity with which Congress must speak in order to override Eleventh Amendment immunity, and we reaffirm it today.

* * *

> There is no need in this case to determine whether Congress has spoken sufficiently clearly to meet a 'clear statement' requirement, and it is therefore irrelevant whether the Eleventh Amendment standard should be . . . as stringent as the one we applied . . . in [*Library of Congress v.*] *Shaw* [478 U.S. 310 (1986)].

491 U.S. at 280-81 (emphasis added) (internal citations omitted). The construction of § 1988 was instead a straightforward matter of statutory interpretation. *Id.* at 281-82.

Petitioners here fail to address *Missouri v. Jenkins*. What the Court's opinion in *Missouri v. Jenkins* decisively settles is that the Eleventh Amendment has no application to this case, because this is an award of attorney's fees ancillary to prospective relief against state officials. Furthermore, the settled law is that the test of the effectiveness of that abrogation is not the clear statement rule, a standard the Court has held is irrelevant in this context. *Missouri v. Jenkins*, 491 U.S. at 281-82. Instead, it is merely a matter of statutory construction. "For this question, it is of no relevance whether the party against which fees are awarded is a State. The question is what Congress intended – not whether it manifested 'the clear affirmative intent … to waive the sovereign's immunity.'" *Id.* at 282 (citation omitted).

2. The States' Historical Liability for Costs in Federal Court Provides Sufficient Basis for the Award of Fees Apart from Any Considerations of Immunity.

Quite apart from the Court's consistent holding that Congress has, to the extent necessary, in fact abrogated the States' Eleventh Amendment immunity against awards of attorney's fees under § 1988, such awards are fully justified under the Court's alternative rationale in *Hutto*. The Court held that § 1988 imposed attorney's fees as part of costs, and costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. 437 U.S. at 695. "The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants." *Id.*

In fact, the Court's subsequent jurisprudence has emphasized the cost prong of *Hutto*'s analysis. *See Missouri v. Jenkins*, 491 U.S. at 278-80. Petitioners challenge *Hutto*'s analysis factually and legally, asserting first that attorney's fees were not recoverable as costs in 1796 when the Eleventh Amendment was adopted, and next that Congress lacks the power to "evade" the Eleventh Amendment by "redefining" costs.

Petitioners are wrong as a matter of historical fact in asserting that attorney's fees were never awardable as costs. Petitioners cite the Court's discussion of the historical treatment of attorney's fees in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 249-50 (1975), to support the propositions that (1) attorney's fees were not recoverable against any party in federal court in 1796, Petition, at 12-13; and (2) Congress cannot "circumvent sovereign immunity by changing a definition of 'costs' that prevailed when the Constitution was ratified and that dates

back through the centuries of the common law." Petition, at 19. Neither averment is accurate.

Alyeska cited *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796), for its holding that the judiciary would not create a general rule, independent of statute, allowing awards of attorney's fees in federal court. 421 U.S. at 249. *Arcambel* involved the award of attorney's fees as damages, not as costs. *Id.* at 249-50. The opinion in *Alyeska* goes on to show that petitioners' historical view is simply wrong. Costs, of course, are not a creature of the common law. *Id.* at 247. But statutory authorization for award of costs, including attorney's fees, has existed in England for centuries. *Id.* "As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs." *Id.* at 247 n.18 (quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967)).

Again, contrary to petitioners' recitation, in 1793 Congress enacted legislation providing that the same costs should be taxed in the federal courts, including for "attornies and counsellors' fees", as were allowed in the supreme or superior courts of the respective states. *Alyeska*, 421 U.S. at 248 n.19 (citing 1 Stat. 333, § 4). This provision was in effect until 1799, *id.*, and thus in effect when the Eleventh Amendment was adopted in 1798. Although the statute expired by its terms, the same practice, referring to state rules governing awards of counsel fees, prevailed in the federal courts from 1799 until 1853. *Id.* at 250.

In 1853, Congress enacted an statute standardizing costs allowable in federal litigation. *Alyeska*, 421 U.S. at 251. Under the statute, the amount of counsel fees

collectible from the opposing party was limited to the amount specified in the act. *Id.* at 252. It was asserted in support of the legislation that losing litigants were being unfairly saddled with exorbitant fees of the prevailing parties' attorneys. *Id.* at 251. It was also noted that all sixteen states in the Union at the time the system was adopted had laws that prescribed taxable costs for attorney's fees. *Id.* at 251 n.24.

The set attorney's fee taxable as costs has been carried forward in the federal statutes. *Id.* at 252-57. The provision setting the amount of the fee taxable to the losing party as a cost is now codified at 28 U.S.C. § 1923(a), and, as relevant here, is still twenty dollars as it was in 1853. 28 U.S.C. § 1923(a).

In Virginia, litigants have been liable for costs that included statutory attorney's fees since at least 1761. *See* 7 Hening's Statutes at Large 400-01. Substantially the same provisions remained in effect throughout the period of ratification of the Constitution and adoption of the Eleventh Amendment. *See* 1 Rev. Code of Va. (1819), ch. 76, §§ 14-17. Under Virginia law, as it was in effect before, during, and after the ratification of the Constitution and the adoption of the Eleventh Amendment, the taxable attorney's fees were the only fees counsel was permitted to receive. *See* 1 Rev. Code of Va. (1819), ch. 76, § 15. As shown above, these provisions were also in effect in the federal courts in Virginia after 1793. There has been no provision excusing the Commonwealth from such awards of costs. Furthermore, just as in the federal system, there remains in effect a statutory provision in the state system for taxation of attorney's fees as costs that does not exempt the State. *See* Va. Code Ann. § 17.1-624.

The Court in *Alyeska* concluded that the determination of the circumstances in which awards of

attorney's fees would be allowed was a matter for Congress to determine as a matter of statute. 421 U.S. at 262. In adopting § 1988, Congress did not alter the definition of costs. It simply increased them. The federal statutory definition of costs has included certain fixed attorney's fees since before the Civil War. *Hutto*, 437 U.S. at 697. The fact that Congress has increased the amount of fees recoverable does not implicate the Eleventh Amendment. *Id.* at 696.

Thus, the historical analysis of the allowance of attorney's fees as costs on which the Court relied in *Hutto* was, in fact, far stronger in its factual predicate than the Court set forth in its opinion. Before, during, and after adoption of the Eleventh Amendment, the state and federal courts in Virginia routinely awarded attorney's fees as part of costs. Moreover, the historical record also refutes petitioners' claim that Congress lacked the legal power to "change" the definition of costs. Statutory costs have always included attorney's fees. "It is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity." *Hutto*, 437 U.S. at 698.

The rationale of the cost prong of the Court's analysis is sufficient by itself to uphold the award of fees in this case and in § 1983 cases generally.

3. Because Petitioners Seek Wholesale Overruling of the Court's Prior Decisions, Considerations of *Stare Decisis* Weigh Heavily Against Granting the Writ On the Remaining Argument Based on the Rule in *Hensley v. Eckerhart.*

When a litigant comes before the Court asking to sweep away so broad a body of settled authority as petitioners seek here, the first hurdle is surely *stare decisis*. Considerations of *stare decisis* have special force in the area of statutory construction. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). In statutory construction, unlike constitutional interpretation, Congress's legislative power is implicated, and remains free to alter what the Court has done. Thus, the Court accords weight to Congress's continued acceptance of the Court's earlier holdings, because Congress could have corrected the Court's statutory construction if Congress disagreed with it, but has chosen not to so. *Id.* Because § 1988 has been amended since *Hensley*, Congress has clearly acquiesced in its holding. *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998).

The differing treatment of plaintiffs and defendants under § 1988 is grounded in clear and explicit legislative history. *Hensley*, 461 U.S. at 429. Just as is the case with *Hutto*, and as demonstrated even more recently, the majority of the Court regard *Hensley* as settled law. *Buckhannon Bd. and Care Home, Inc. v. West Va. Dept. of Health and Human Resources*, 532 U.S. 598, 603 n.4 (2001). In fact, the Court noted its specific reliance on the legislative history that the petitioners urge the Court to reject, stating that it had relied on the same legislative history in *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 790 (1989), *Maher v. Gagne*, 448 U.S. 122, 129 (1980), and *Hanrahan v. Hampton*, 446 U.S. 754, 756-57

(1980) (*per curiam*), and would do so again. *Buckhannon*, 532 U.S. at 607.[1]

Under § 1988, when the State or its officials in their official capacities are defendants, they are treated no differently from any other defendants. When they are plaintiffs, they are treated no differently from other § 1983 plaintiffs. If one accepts for the sake of argument the undemonstrated premise of petitioners' argument, that State officials are more likely to be defendants in § 1983 cases, that is because § 1983 is a statute addressed to abuses under color of state law. This is an effect of the intent and subject matter of the particular statute, not a discriminatory application of § 1988. If anything, state officials are treated more favorably, because Congress recognized that fee awards may be paid by the State rather than the individuals. State officials often have been, as here and as in *Hutto*, represented by the state attorney general. Non-governmental § 1983 litigants generally lack such advantages.

In other cases subject to § 1988, such as actions under 42 U.S.C. §§ 1981, 1982, or 2000d, it might be rare for state officials to be defendants, but such private parties would not be heard to claim that the law was discriminatory. *See, e.g.*, *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996), *on remand*, 972 F. Supp. 355, 359 (W.D. Va. 1997) (fees assessed against state political party and county party committee under § 1988).

The petitioners' argument is simply a plain language argument for a construction of the statute that ignores abundant evidence of Congressional intent. The Court has

---

[1] Although the issue before the Court was different in *Buckhannon* and the cases cited, the Court could have added *Hutto* to the list of cases in which it had relied specifically on the legislative history of § 1988. *See Hutto*, 437 U.S. at 694.

indicated repeatedly, most recently last year, that it will continue to rely on the legislative history of § 1988 in construing the statute. Congress's intent is plain. To overturn the Court's longstanding construction of the statute would merely invite a legislative response to restore what the Court has already recognized.

CONCLUSION

The petitioners propose a radical overhaul of the nation's civil rights jurisprudence. Their arguments, however, proceed from dissent to dissent in advocating the adoption today of positions and arguments already rejected by the Court. As the Court held *in Missouri v. Jenkins*, *Hutto*'s reasoning survived *Atascadero State Hosp.* and *Dellmuth v. Muth*. There is no reason to conclude that the same reasoning is not proof against the same arguments, whether they are based on *Atascadero* and *Dellmuth v. Muth* or on *Seminole Tribe* and *Alden v. Maine*. After *Missouri v. Jenkins,* much as petitioners may want to impose it, the Eleventh Amendment simply has no applicability to a fee award under § 1988.

Petitioners have advanced no sound reason for the Court to retreat from its long-settled rulings and from what is not only a significant number of decisions of this Court, but a vast number of decisions in the federal courts below made in reliance on *Hutto v. Finney* and *Hensley v. Eckerhart*.

Therefore, respondent National Home Equity Mortgage Association prays that the Court will deny the petition for writ of certiorari and allow settled federal law to remain settled.

Respectfully Submitted,

NATIONAL HOME EQUITY
MORTGAGE ASSOCIATION

E. Duncan Getchell, Jr.*
Robert L. Hodges
William H. Baxter, II
McGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, Virginia 23219-4030
(804) 775-1000 (Telephone)
(804) 698-2061 (Facsimile)

*Counsel of Record

Supreme Court, U.S.
FILED
JUL 17 2002
CLERK

No. 01-1827

In The
Supreme Court of the United States

E. JOSEPH FACE, JR., ET AL.,

Petitioners,

v.

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE STATES OF FLORIDA, COLORADO, DELAWARE, ILLINOIS, INDIANA, MISSISSIPPI, NEVADA, NEW JERSEY, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, VERMONT AND THE TERRITORY OF THE NORTHERN MARIANA ISLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROBERT A. BUTTERWORTH
Attorney General of Florida
THOMAS E. WARNER
Solicitor General of Florida
Counsel of Record
LOUIS F. HUBENER
Deputy Solicitor General
MATTHEW J. CONIGLIARO
Deputy Solicitor General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3681

(Additional Counsel Listed Within)

KEN SALAZAR
Attorney General of Colorado
1525 Sherman Street
Denver, CO 80203

M. JANE BRADY
Attorney General of Delaware
820 N. French Street
Wilmington, DE 19801

JAMES E. RYAN
Attorney General of Illinois
100 W. Randolph Street
Chicago, IL 60601

STEVE CARTER
Attorney General of Indiana
402 West Washington Street
Indianapolis, IN 46204

MIKE MOORE
Attorney General of Mississippi
P. O. Box 220
Jackson, MS 39205

FRANKIE SUE DEL PAPA
Attorney General of Nevada
100 N. Carson Street
Carson City, NV 89701

DAVID SAMSON
Attorney General of New Jersey
R. J. Hughes Justice Complex
25 Market Street
P. O. Box 080
Trenton, New Jersey 08625

BETTY D. MONTGOMERY
Attorney General of Ohio
30 E. Broad Street, 17th Floor
Columbus, OH 43215

W. A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard
Suite 112
Oklahoma City, OK 73105

CHARLES M. CONDON
Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29211

MARK BARNETT
Attorney General of South Dakota
500 East Capitol Avenue
Pierre, SD 57501

JOHN CORNYN
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609

ROBERT T. TORRES
Attorney General of the Northern
Mariana Islands
2nd Floor, Honorable Juan A.
Sablan Memorial Building
Capitol Hill
Saipan, MP 96950

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI 1

REASONS TO GRANT THE PETITION 2

I. THE COURT'S RECENT SOVEREIGN IMMUNITY JURISPRUDENCE BEGINNING WITH *SEMINOLE TRIBE V. FLORIDA* HAS SUBSTANTIALLY ERODED THE COURT'S RULINGS IN *HUTTO* AND *JENKINS*. 2

A. *Hutto* and *Jenkins* 3

B. *Seminole Tribe* and Its Progeny 5

C. The Undermining of *Hutto* and *Jenkins* 7

II. CONTRARY TO *HUTTO*'S SUPPOSITION, ATTORNEY'S FEES JUDGMENTS PLACE SUBSTANTIAL BURDENS ON STATES. 9

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 3

Alden v. Maine, 527 U.S. 706 (1999) 6,7,8

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) 6

Buckhannon Road and Care Home, Inc. v. West Va. Department of Health and Human Resources, 532 U.S. 598 (2001) 8,12

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999) 6,7

Dennis v. Higgins, 498 U.S. 439 (1991) 11,13

Dalehite v. United States, 346 U.S. 15 (1953) 10

Edelman v. Jordan, 415 U.S. 651 (1974) 5

Environmental Technology Council v. State of South Carolina, 215 F.3d 1318 (4th Cir. 2000) 11

Ex parte Young, 209 U.S. 123 (1908) 5

Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927) .. 4

Federal Maritime Commission, 122 S. Ct. 1864 (2002) 6

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 3

Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824) 10

Golden State Transit. Corp. v. City of Los Angeles,
493 U.S. 103 (1989) 10

Huron Portland Cement Co. v. City of Detroit,
362 U.S. 440 (1960) 10

Hutto v. Finney, 437 U.S. 678 (1978) ..... *passim*

Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) ... 7

Library of Congress v. Shaw, 478 U.S. 310 (1986) 4

Major League Baseball v. Butterworth,
181 F. Supp. 2d 1316 (N.D. Fla. 2001), ... 11

Missouri v. Jenkins, 491 U.S. 274 (1989) ..... *passim*

Owner-Operator Independent Drivers Association v. Bissell,
210 F.3d 595 (6th Cir. 2000) 11

Parden v. Terminal Railroad of Alabama Docks Department,
377 U.S. 184 (1964) 5,6

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 5,6,9

Scheuer v. Krause, 416 U.S. 232 (1974) 10

Seminole Tribe v. Florida, 517 U.S. 44 (1996) ..... *passim*

FEDERAL STATUTES

42 U.S.C. § 1983 10,12

42 U.S.C. § 1988 ..... *passim*

Golden State Transit. Corp. v. City of Los Angeles,
493 U.S. 103 (1989) 10

Huron Portland Cement Co. v. City of Detroit,
362 U.S. 440 (1960) 10

Hutto v. Finney, 437 U.S. 678 (1978) ..... *passim*

Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) ... 7

Library of Congress v. Shaw, 478 U.S. 310 (1986) 4

Major League Baseball v. Butterworth,
181 F. Supp. 2d 1316 (N.D. Fla. 2001), ... 11

Missouri v. Jenkins, 491 U.S. 274 (1989) ..... *passim*

Owner-Operator Independent Drivers Association v. Bissell,
210 F.3d 595 (6th Cir. 2000) 11

Parden v. Terminal Railroad of Alabama Docks Department,
377 U.S. 184 (1964) 5,6

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 5,6,9

Scheuer v. Krause, 416 U.S. 232 (1974) 10

Seminole Tribe v. Florida, 517 U.S. 44 (1996) ..... *passim*

FEDERAL STATUTES

42 U.S.C. § 1983 10,12

42 U.S.C. § 1988 ..... *passim*

INTEREST OF THE *AMICI*

The Fourth Circuit's decision in this case stands for the proposition that plaintiffs may recover substantial attorney's fee awards against a State pursuant to 42 U.S.C. § 1988, where the cause of action is based solely on Commerce Clause preemption of an otherwise valid state law. This places State officials in the untenable position of choosing between not doing their duty to enforce state law where there is potential federal preemption under the Commerce Clause, or subjecting their state to a substantial money judgment award of attorney's fees for enforcement of state law, which may be subsequently preempted by federal law. The threat of these judgments not only interferes with the sovereign duties and responsibilities of state officials, but also constitutes a potentially serious impact on the States' treasuries. For these reasons, the *amici* States have a direct interest in question one of the petition and submit that the decision of the Fourth Circuit violates the States' sovereign immunity under the Eleventh Amendment.

REASONS TO GRANT THE PETITION

I. THE COURT'S RECENT SOVEREIGN IMMUNITY JURISPRUDENCE BEGINNING WITH *SEMINOLE TRIBE V. FLORIDA* HAS SUBSTANTIALLY ERODED THE COURT'S RULINGS IN *HUTTO* AND *JENKINS*.

Like numerous other lower courts, the Fourth Circuit relied on this Court's decisions in *Hutto v. Finney*, 437 U.S. 679 (1978), and *Missouri v. Jenkins*, 491 U.S. 274 (1989), to affirm an attorney's fees award under § 1988 against a State's officials, even though the State was not alleged to have violated the Fourteenth Amendment. That reliance is understandable, given the broad language used by the Court in *Hutto* and *Jenkins* to permit the award of attorney's fees in those cases. But both decisions were issued when this Court permitted the States' sovereign immunity to be overcome readily. Moreover, both cases addressed the consequences of Fourteenth Amendment violations by States, meaning neither squarely addressed whether a State must pay attorney's fees under § 1988 after losing a case brought to enforce Article I of the Constitution.

The Court's recent sovereign immunity decisions, beginning with *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), establish that Congress lacks the power to subject the States to money judgments payable to private parties in non-Fourteenth Amendment cases. The broad reasoning of *Hutto* and *Jenkins* - which accepted Congress's designation of attorney's fees as costs, and hence as ancillary to prospective relief allowable under Ex parte Young- is, therefore, no longer tenable. Congress cannot use such sleight of hand to negate the States' sovereign immunity.

The impact of this loophole to the State's sovereign immunity is substantial. In numerous instances, States have been forced to pay hundreds of thousands of dollars in attorney's fees to private parties because the State defended, in good faith, a law

or regulation that was found to be preempted by Article I legislation or found to have violated the dormant Commerce Clause law. Because the Court maintains the exclusive authority to overrule its cases where their rationales have been rejected but their holdings remain applicable, *Agostini* v. *Felton,* 521 U.S. 203, 237 (1997), only this Court can remedy the situation. Certiorari should be granted to revisit *Hutto* and *Jenkins* or limit their application to Fourteenth Amendment cases.

A. *Hutto* and *Jenkins*

Both *Hutto* and *Jenkins* involved Fourteenth Amendment rights. Although the majority in *Hutto*, as well as the four dissenting Justices, gave serious consideration to the application of the Eleventh Amendment, ultimately *Jenkins* discounted the relevance of that amendment.

In *Hutto*, Arkansas officials were held liable for violating inmates' Eighth Amendment rights, as incorporated through the Fourteenth Amendment. The Court of Appeals assessed the officials with appellate attorney's fees under § 1988, and the officials argued to this Court that Arkansas's Eleventh Amendment immunity barred the award because Congress had not clearly abrogated States' immunity through the statute's language.

The Court rejected that argument. The Court first explained that, under *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), Congress had plenary power to set aside States' Eleventh Amendment immunity to enforce the Fourteenth Amendment, and that the legislative history behind § 1988 revealed Congress's intent to exercise that authority by adopting the statute. 437 U.S. at 693-95. Next, the Court observed that Congress designated attorney's fees under § 1988 to be "part of the costs" awarded prevailing parties and that costs had previously been imposed on States "without regard for the States' Eleventh Amendment immunity." *Id.* at 695-98. In footnotes, the Court characterized costs as expenses incurred in seeking prospective relief, and the Court mused that an award of

costs, including fees, "could hardly" create enormous fiscal burdens on the States. *Id.* at 695-97 nn.24, 27.

Noting that attorney's fees were regularly taxed as an item of costs in England, while not in America, the Court then stated that Congress had at various times designated fees as costs, and the Court identified a single case where it had imposed those costs on a State, including fees, without objection. *Id.* at 696 (citing *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927)). From this, the Court concluded, "It is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity." *Id.* at 698.

Four justices dissented from these conclusions. In his partial dissent, joined by Chief Justice Burger and Justice White, Justice Powell asserted that Congress's failure to include an express abrogation of States' Eleventh Amendment immunity in § 1988 precluded a finding of any such abrogation. Justice Powell further contended that this failure could not be excused by Congress's designation of fees as costs or simply because Congress acted under § 5 of the Fourteenth Amendment, rather than some other authority. *Id.* at 704-10. In a separate dissent, then-Associate Justice Rehnquist joined this portion of Justice Powell's partial dissent and further questioned whether Congress's § 5 authority to abrogate States' immunity extended to Eighth Amendment violations. *Id.* at 717-18.

Eleven years later, in *Missouri v. Jenkins*, the Court considered Missouri's appeal from a § 1988 attorney's fees award in a school desegregation case under Title VII of the Civil Rights Act of 1964. Missouri argued that case law subsequent to *Hutto* confirmed that Congress must expressly abrogate States' Eleventh Amendment immunity in the relevant statute and that this had not occurred in the case of § 1988 and Title VII. Missouri also argued that *Library of Congress v. Shaw*, 478 U.S. 310 (1986), which disallowed an interest award under § 1988 against the Federal Government because Congress did not expressly abrogate the Federal Government's sovereign

immunity, demonstrated that States also could not be assessed interest on an attorney's fees award.

Jenkins relied on *Hutto* to reject both arguments. The Court characterized *Hutto* as utilizing a distinction previously drawn in *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Ex parte Young*, 209 U.S. 123 (1908), between "retroactive monetary relief" and "prospective injunctive relief," with attorney's fees awards belonging to the latter category because they offer only reimbursement for expenses incurred in seeking prospective relief. 491 U.S. at 278-79. From this, *Jenkins* concluded that *Hutto* had removed attorney's fees from the ambit of State's Eleventh Amendment immunity and that express abrogations of that immunity were thus unnecessary in statutes awarding attorney's fees against States. *Id.* at 279-84. The Court summed its holding in this short statement: "[T]he Eleventh Amendment has no application to an award of attorney's fees, ancillary to a grant of prospective relief, against a State." *Id.* at 284.

B. *Seminole Tribe* and Its Progeny

Since the Court decided *Hutto* and *Jenkins*, its view of the nature of States' sovereign immunity has changed significantly.

During the time between the Court's decisions in *Hutto* and *Jenkins*, the Court held a weak view of States' immunity as sovereigns. For instance, just four days before the Court decided *Jenkins*, the Court held that Article I's Commerce Clause affords Congress the power to abrogate States' Eleventh Amendment immunity. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). *Union Gas* suggested, by implication, that numerous other sources of congressional power likewise permitted Congress to abrogate States' immunity. Similarly, the Court's earlier decision in *Parden v. Terminal Railroad of Alabama Docks Department*, 377 U.S. 184 (1964), held that States could constructively waive their sovereign immunity by participating

in activities identified by Congress as requiring a waiver of States' Eleventh Amendment immunity.

Thus, at the time of *Hutto* and *Jenkins*, the Court looked upon States' inherent immunity as a narrow concept, rooted in the Eleventh Amendment and subject to defeasement at the will of Congress. The Court's 1996 decision in *Seminole Tribe*, however, overruled *Union Gas* and firmly fixed the Court on the route to strengthening State's status as sovereigns. *Seminole Tribe* held that nothing in Article I of the Constitution empowers Congress to abrogate States' Eleventh Amendment immunity and that only the Fourteenth Amendment has been properly held to contain such a grant of authority.

Subsequent cases further expounded the nature of States' immunity. The Court clarified that States' sovereign immunity is a basic feature of statehood that predated and was preserved by the Constitution, neither defined nor limited by the Eleventh Amendment, and that except when Congress properly utilizes its enforcement authority under § 5 of the Fourteenth Amendment, Congress must treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation. *Alden v. Maine*, 527 U.S. 706, 755 (1999).

In addition, the Court overruled *Parden* and held that Congress may not circumvent its inability to abrogate States' sovereign immunity by declaring that States' participation in various activities constitutes a constructive waiver of their immunity. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). Later cases have further defined the substantial dignity accompanying States' sovereign status and the concomitant limitations on Congress's powers over the States. *E.g.*, *Federal Maritime Comm'n*, 122 S. Ct. 1864 (2002) (holding Congress may not abrogate States' sovereign immunity in administrative proceedings); *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (holding Congress could not abrogate States' sovereign immunity for claims under Title I of

the Americans with Disabilities Act); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (same for claims under the Age Discrimination in Employment Act).

C. The Undermining of *Hutto* and *Jenkins*

The fundamental restatement of the balance of power between the States and the Federal Government that the Court achieved through *Seminole Tribe* and its progeny has significantly undermined the rationales espoused by the Court in *Hutto* and *Jenkins*. This may be seen in at least two principal respects.

First, the Court has now placed tremendous emphasis on the dignity that accompanies States' status as sovereigns. *Alden*, 527 U.S. at 748 ("[O]ur federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."). This theme is found in *Seminole Tribe* and echoes in the Court's subsequent cases, such as *College Saving Bank*, where the Court held Congress may not circumvent its inability to abrogate States' sovereign immunity by employing a legal fiction. To conclude, however, that attorney's fees do not touch upon States' sovereign immunity on the theory, expressed in *Hutto*, that such amounts are insubstantial and thus constitutionally inconsequential, or the theory, expressed in *Hutto* and *Jenkins*, that Congress has simply deemed attorney's fees the equivalent of court-imposed costs of a judicial proceeding, is, in either case, to employ a fiction that wholly ignores the dignity due States as sovereigns.

To begin, by no means are attorney's fees awards necessarily insubstantial. They may total hundreds of thousands (as they probably will in Virginia's case) or, conceivably, even millions of dollars. *See* Point II, *infra*. Sovereign immunity is intended to protect States' treasuries from intrusions by private persons and to ensure that States themselves, not Federal Courts or private citizens, determine how States' financial resources

should be allocated. *See, e.g., Alden*, 527 U.S. at 751. Surely that concern should encompass attorney's fees judgments that may entail six- or seven-figure awards. It is inexplicable that sovereign immunity permits attorney's fees awards in these amounts but bars a $10 claim for compensatory damages.

Furthermore, neither the States nor the federal courts view attorney's fees as a generally taxable cost of a judicial proceeding. *See, e.g., Buckhannon Rd. and Care Home, Inc. v. West Va. Dep't of Health and Human Resources*, 532 U.S. 598, 602 (2001) ("In the United States, parties are ordinarily required to bear their own attorney's fees--the prevailing party is not entitled to collect from the loser."). Thus, only Congress's act of denominating fees as costs in § 1988 results in States being subject to judgments for attorney's fees. States' dignity as sovereigns should not be subjected to such linguistic machinations. Congress should not be permitted to cloak attorney's fees with the title "costs" just as it should not be permitted to cloak any form of compensatory damages as "costs."

A second and related means by which *Seminole Tribe* and its progeny have undermined *Hutto* and *Jenkins* lies in the recently established principle that Congress lacks the authority to abrogate States' sovereign immunity except with respect to its enforcement authority under § 5 of the Fourteenth Amendment. *Hutto* involved Fourteenth Amendment violations, and the decision placed tremendous emphasis on Congress's ability and intent to abrogate States' immunity in that context and impose the fee awards that were at issue in the case. That Congress *could* impose the attorney's fees award in *Hutto* reduced the immunity issue to a question of whether Congress did so properly, and this undoubtedly affected the analysis the Court undertook when it concluded both that Congress had done so properly *and*, largely in a footnote, that attorney's fees lie outside the scope of States' immunity.

The Court's mistaken view of Congress's authority likely affected *Jenkins* as well, which also involved Fourteenth

Amendment violations. There, without considering whether Congress took the proper steps to abrogate States' immunity, the Court simply followed the portion of *Hutto* that declared attorney's fees beyond the scope of States' immunity.

The *Jenkins* court could not have foreseen this decision's impact. Especially since the Court had decided *Union* Gas only four days earlier, the *Jenkins* court could not know that holding attorney's fees outside the scope of States' sovereign immunity would impact cases, such as the present case, where Congress completely lacks the constitutional authority to abrogate that immunity. The *amici* States believe that, were the Court to revisit this matter in light of *Seminole Tribe* and its progeny, the Court would appreciate that holding attorney's fees outside States' sovereign immunity permits them to be imposed where Congress entirely lacks the power to abrogate that immunity. In light of this, the *amici* States believe that the Court would greater scrutinize the merit, or lack of merit, of that position.

In sum, the Court's recent sovereign immunity jurisprudence has undermined the foundation on which *Hutto* and *Jenkins* rest. Accordingly, the *amici* States urge the Court to grant the requested writ of certiorari and revisit the Court's decisions in those two cases.

II. CONTRARY TO *HUTTO*'S SUPPOSITION, ATTORNEY'S FEES JUDGMENTS PLACE SUBSTANTIAL BURDENS ON STATES.

Hutto expressed the view that attorney's fees, together with traditionally taxable costs, "could hardly" impose enormous fiscal hardships on a State, and the Court appeared to suggest that its analysis might be otherwise were that not the case. 437 U.S. at 697 n.27. Over two decades later, that view has proven not to be the case. Furthermore, attorney's fees are being awarded in cases where the States' efforts to protect the well-being of their citizens have innocently crossed the boundary between the States' sphere of governance and that of Congress.

In all likelihood, this situation was not apparent to the Court in *Hutto* and *Jenkins*, and for this additional reason, the Court should grant the requested writ of certiorari in this case and revisit the decisions in these cases.

"[T]he public interest requires decisions and action to enforce laws for the protection of the public. Mr. Justice Jackson expressed this general proposition succinctly, stating 'it is not a tort for government to govern.'" *Scheuer v. Krause*, 416 U.S. 232, 242 (1974) (quoting *Dalehite v. United States*, 346 U.S. 15, 57 (1953) (dissenting opinion)). Justice Jackson's apothegm remains true today. Nevertheless, while it may be no sin for government to govern, a heavy penance is currently being exacted in the form of attorney's fees from States whose only intent in exercising their governmental power is to protect the health, safety and well-being of their citizens.

The apportionment of power under the Constitution allows both the Federal Government and the States to regulate commerce, and it has long been established that in the exercise of their police power States may act concurrently with the Federal Government in many areas of commerce. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824)). Wherever States' exercise of this authority touches upon interstate commerce, however, States risk two particular pitfalls that may give rise to private actions under 42 U.S.C. § 1983.

First, a State's regulatory acts may be found to conflict with federal law enacted by Congress under its Article I powers. As in the case now before the Court, the federal law at issue has typically been enacted under Congress's Commerce Clause authority, and, regardless, if that law affords persons federal rights, then they may bring a claim under § 1983 to remedy a State's violation of those rights. *See Golden State Transit. Corp. v. City of Los Angeles*, 493 U.S. 103 (1989). Second, a State's regulatory acts may be found to violate the dormant aspects of the Commerce Clause by impermissibly burdening interstate commerce, and private persons may bring a claim under § 1983

to remedy such violations. Such claims have only been viable since this Court's decision in *Dennis v. Higgins*, 498 U.S. 439 (1991), where the Court held that the Commerce Clause provides persons with federal rights that are enforceable under § 1983.

In both cases, this Court's decisions in *Hutto v. Finney*, 437 U.S. 678 (1978), and *Missouri v. Jenkins*, 491 U.S. 274 (1989), permit attorney's fees awards against States' officials under 42 U.S.C. § 1988 as part of the "costs" of obtaining relief. As a result, the risk of attorney's fees awards now exists whenever States' engage in economic regulation for the benefit of their citizens' health, safety, and welfare.

Such exposure has had serious consequences, the most obvious being the potential fiscal impact of attorney's fees awards. Fee awards can be very high. Typical plaintiffs in these cases are corporations or trade associations that employ high-priced counsel. Their fees may easily reach hundreds of thousands of dollars and could conceivably reach millions of dollars.

For example, in *Environmental Technology Council v. State of South Carolina*, 215 F.3d 1318 (4th Cir. 2000), the plaintiff challenged South Carolina's restrictions on the treatment and disposal of hazardous waste generated in other states. The court awarded fees of $486,489.42. In *Owner-Operator Independent Drivers Association v. Bissell*, 210 F.3d 595 (6th Cir. 2000), the court awarded a truck drivers' trade association, which sued Tennessee, $515,700 in attorneys' fees for litigating claims arising under the Commerce Clause and other constitutional provisions.

Florida may face fees as high or higher in a case now on appeal in the Eleventh Circuit. *See Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316 (N.D. Fla. 2001), *appeal pending*, Case No. 02-10333-C, Eleventh Circuit Court of Appeals. In that case the Attorney General of Florida began an antitrust civil investigation of Major League Baseball after it proposed to eliminate two major league teams and leave the Florida market unless a new taxpayer-financed stadium were

built for the Florida Marlins. Major League Baseball filed suit under § 1983 to enjoin the investigation and the district court found that Major League Baseball had a constitutional right under the Commerce Clause not to be investigated. The two law firms representing Major League Baseball have claimed over 1,525 hours of work in a roughly five-month period, and the appeal is by no means concluded. If it is lost, fees in the case will likely exceed $500,000.

States can ill afford such outlays. Fee awards of such magnitude have a very serious impact on limited state budgets. An award of $500,000 or more in a single case that is to be paid out of the budget of a typical State's attorney general's office would seriously impair the ability of that office to perform its many responsibilities. Moreover, where economic regulation is at issue, as in the instant case, the prospect of what amounts to a hefty fine for a mistaken view of the reach of federal law can serve only to discourage States' willingness to address economic and consumer problems with appropriate and perhaps novel legislation. Though attorney's fees may be characterized in § 1988 as merely part of the "costs" of obtaining relief, the States' treasuries are no less depleted than if retroactive, compensatory damages were awarded, and the States' desire and ability to employ their police power for the benefit of their citizens are no less chilled. No matter what terminology is used, the practical effect of such awards is no different than that of any money judgment for damages.

Furthermore, the threat of a judgment for substantial attorney's fees can place States' officials in an untenable constitutional quandary. On the one hand, a State official may be duty-bound to follow state law and in good faith believe that law to be constitutional. Yet, on the other hand, the official may not be willing or able to risk a substantial monetary award in the form of attorney's fees if the official is later found to be incorrect. *See Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 608 (2001) (noting such consequences of attorneys' fees awards).

In sum, fee awards are a heavy burden to bear for what Justice Kennedy has termed "a State's quite innocent but mistaken judgment respecting the shifting boundary between two sovereign powers." *Dennis v. Higgins*, 498 U.S. 439, 451 (1991) (Kennedy, J., dissenting). Because of the substantial impact created by imposing attorney's fees on States in cases outside the context of the Fourteenth Amendment, such as cases involving violations of Congress's Article I authority, the *amici* States urge the Court to grant certiorari to review the attorney's fees award in this case.

CONCLUSION

For all of the foregoing reasons, and with respect to the first question presented in Virginia's Petition for Writ of Certiorari, the Court should grant the requested writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General of Florida
THOMAS E. WARNER
Solicitor General of Florida
Counsel of Record
LOUIS F. HUBENER
Deputy Solicitor General
MATTHEW J. CONIGLIARO
Deputy Solicitor General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3681

(4)

Supreme Court, U.S.
FILED
AUG 16 2002
OFFICE OF THE CLERK

No. 01-1827

In The Supreme Court of the United States

E. JOSEPH FACE, JR., in his official capacity as Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission, and SUSAN E. HANCOCK, in her official capacity as Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

Petitioners,

v.

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM H. HURD
State Solicitor
Counsel of Record

JUDITH WILLIAMS JAGDMANN
Deputy Attorney General

MAUREEN RILEY MATSEN
WILLIAM E. THRO
Deputy State Solicitors

CHRISTY A. MCCORMICK
Assistant Attorney General

900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 371-0200 (facsimile)

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

HPP

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine,
527 U.S. 706 (1999) 6

Alexander v. Sandoval,
532 U.S. 275 (2001) 6

Alyeska Pipeline Co. v. Wilderness Society,
421 U.S. 240 (1975) 5, 9

Anderson v. Creighton,
483 U.S. 635 (1987) 5

Booth v. Maryland,
482 U.S. 496 (1987) 1

Brown v. Board of Educ.,
347 U.S. 483 (1954) 2

City of Boerne v. Flores,
521 U.S. 507 (1997) 3

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666 (1999) 2

Connecticut General Life Insurance Co. v. Johnson,
303 U.S. 77 (1938) 1

Ex Parte Young,
209 U.S. 123 (1908) 6

Federal Maritime Comm'n v. South Carolina State Ports Auth.,
122 S. Ct. 1864 (2002) 2, 6

Fitzpatrick v. Bitzer,
427 U.S. 445 (1976) 7

TABLE OF AUTHORITIES – Continued

Page

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) 4

Gonzaga Univ. v. Doe, 122 S. Ct. 2268 (2002) 3

Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828) 6

Grady v. Corbin, 495 U.S. 508 (1990) 1

Hensley v. Eckerhart, 461 U.S. 424 (1983) 1, 3, 8

Hutto v. Finney, 437 U.S. 678 (1978) 1, 2, 3, 4

In re Ayers, 123 U.S. 443 (1887) 6

Missouri v. Jenkins, 491 U.S. 274 (1989) 4

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) 6

Parden v. Terminal Railroad, 377 U.S. 184 (1964) 2

Payne v. Tennessee, 501 U.S. 808 (1991) 1

Pennsylvania v. Union Gas, 491 U.S. 1 (1989) 2, 4

Plessy v. Ferguson, 163 U.S. 557 (1896) 2

Raygor v. Regents of the Univ. of Minn., 122 S. Ct. 999 (2002) 5, 7, 8

TABLE OF AUTHORITIES – Continued

Page

Seminole Tribe v. Florida,
517 U.S. 44 (1996) 2, 3, 4

United States v. Dixon,
509 U.S. 688 (1993) 1

United States v. Lopez,
514 U.S. 549 (1995) 7

Vermont Agency of Natural Resources v. United States ex rel. Stevens,
529 U.S. 765 (2000) 5, 8

Wilder v. Virginia Hosp. Ass'n,
496 U.S. 498 (1990) 2, 3

Will v. Michigan Dep't of State Police,
491 U.S. 58 (1990) 1, 6, 8

STATUTES

12 U.S.C. § 3801 4

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 ..... 1, 4, 8

REPLY BRIEF OF PETITIONER

Nothing in respondent's brief in opposition calls into question the need for this Court to review and reverse the decision below. Respondent does not contest that this Court's sovereign immunity jurisprudence is fundamentally different than it was a generation ago when *Hutto v. Finney*, 437 U.S. 678 (1978), was decided. Nor does it even attempt to demonstrate that, under current jurisprudence, *Hutto* is decided correctly. Furthermore, respondent does not dispute that "if Congress intends to alter the usual constitutional balance between the States and the federal government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1990). Nor does it even attempt to argue that, in enacting 42 U.S.C. § 1988, Congress clearly and unambiguously stated its intention *within the statutory text* to impose an attorneys' fees regime that discriminates against the States. Rather, respondent ignores the jurisprudence of the past decade and simply asserts that *Hutto* should stand, along with *Hensley v. Eckerhart*, 461 U.S. 424 (1983), which interpreted § 1988 to discriminate against the States.

1. "A constitutional decision that is wrong should not stand." *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 85 (1938) (Black, J., dissenting). This Court has recognized the truth of Justice Black's statement. Over the years, it has not hesitated to correct its previous constitutional errors, even when those errors have become a generally accepted part of our constitutional jurisprudence. *Compare, e.g., United States v. Dixon*, 509 U.S. 688 (1993), with *Grady v. Corbin*, 495 U.S. 508 (1990) (double jeopardy); *Payne v. Tennessee*, 501 U.S. 808 (1991), with *Booth v. Maryland*, 482 U.S. 496 (1987) (victim impact

evidence); *Brown v. Board of Educ.*, 347 U.S. 483 (1954), with *Plessy v. Ferguson*, 163 U.S. 537 (1896) ("separate but equal").

This Court has shown a particular willingness to revisit its decisions concerning the role of the States in "our Nation's constitutional blueprint." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 122 S. Ct. 1864, 1870 (2002). For example, in 1989, this Court held that Congress could use its general Article I powers to abrogate the sovereign immunity of the States. *See Pennsylvania v. Union Gas*, 491 U.S. 1 (1989). Yet, a mere seven years later, this Court held that abrogation of sovereign immunity was possible only if Congress exercised its powers under Section 5 of the Fourteenth Amendment. *See Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996). Similarly, in 1964, this Court held that mere participation in interstate commerce constituted a waiver of a State's sovereign immunity. *See Parden v. Terminal Railroad*, 377 U.S. 184 (1964). In 1999, this Court reexamined its decision and overruled it. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999). With this petition, the Commonwealth of Virginia, supported by fourteen other States and one territory as *amici*, asks this Court to reconsider its decision in *Hutto*. Like *Union Gas* and *Parden*, *Hutto* is a constitutional decision that is wrong and should not stand.

Of course, this Court's willingness to revisit its previous decisions is not limited to constitutional questions. This Court has also revisited its statutory constructions. For example, at one time this Court suggested that 42 U.S.C. § 1983 could be used to enforce any federal statute where Congress arguably intended a "benefit" for plaintiffs. *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509

(1990) ("Congress must have intended that the provision in question benefit the plaintiff"). However, this past term, this Court repudiated the language of *Wilder* and limited § 1983 actions to those statutes which clearly and unambiguously create new individual rights. *See Gonzaga Univ. v. Doe*, 122 S. Ct. 2268, 2275-77 (2002). This petition requests reconsideration of *Hensley*. Like the expansive language of *Wilder*, *Hensley* represents an erroneous statutory interpretation that must be corrected.

A writ should be granted so that this Court can reconsider its previous constitutional decision, *Hutto*, and its previous statutory decision, *Hensley*. The principles of stare decisis should not protect incorrect decisions touching on important principles of federalism.

2. Respondent's opposition altogether ignores the fact that, in the last few years, this Court's sovereign immunity jurisprudence has undergone a dramatic transformation. As explained in more detail in the petition, *Seminole Tribe* and its progeny hold that congressional abrogation of sovereign immunity can be accomplished only if (1) Congress unequivocally expressed its intent to abrogate immunity for claims based on a specific statute; and (2) Congress acted pursuant to § 5 of the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 56-59. In deciding whether Congress acted pursuant to § 5 of the Fourteenth Amendment, this Court requires application of the two-part test from *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Even where Congress has passed a statute implicating the substantive guarantees of the Fourteenth Amendment, it may not abrogate sovereign immunity for that statute unless it can (1) "identify conduct transgressing the Fourteenth Amendment's substantive provisions" and (2) "tailor its legislative scheme to remedying or

preventing such conduct." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 639 (1999).

Yet, respondent ignores these developments and argues that this Court's reaffirmation of *Hutto* in *Missouri v. Jenkins*, 491 U.S. 274 (1989), makes it unnecessary to reexamine *Hutto* in light of more recent precedent. But, *Jenkins* was decided at the same time as *Union Gas,* which substantially expanded Congress' power to abrogate sovereign immunity. Given that *Seminole Tribe* repudiated *Union Gas*, there must be serious doubt about the continued viability of *Jenkins* as well as *Hutto*. Respondent's reliance on *Jenkins*, to the exclusion of more recent relevant cases, neatly underscores the need for this Court to revisit the question.

Quite simply, this Court has not yet applied its post-*Seminole Tribe* analytical framework to § 1988. As explained in the petition, that analysis raises serious doubt that § 1988 is a valid abrogation of sovereign immunity, at least in the context of a 42 U.S.C. § 1983 claim to enforce the Parity Act, 12 U.S.C. § 3801. The writ should be granted so that this Court may consider whether its previous interpretation of § 1988 meets the *Seminole Tribe* standard.

3. The respondent, apparently realizing that § 1988 does not meet the *Seminole Tribe* standard, argues that there is an alternative basis for the result in *Hutto*. Specifically, the respondent contends that the States historically have been liable for attorneys' fees as part of costs in federal court regardless of sovereign immunity concerns. In support of its contention, the respondent notes that the English Parliament and the colonial legislatures occasionally passed statutes that authorized courts to impose

attorneys' fee liability on common litigants as part of costs. The Congress enacted similar measures at various times. Because common litigants were sometimes liable for attorneys' fees as part of costs, the respondent asserts that the States were liable for attorneys' fees as part of costs regardless of sovereign immunity.

This assertion is seriously flawed. It ignores the fundamental distinction between a common litigant, such as a private party or a corporation or even a local governmental entity, and a *sovereign*, such as the Crown, the United States, or one of the States. The mere fact that common litigants in the federal courts sometimes were liable for attorneys' fees as part of costs does not necessarily mean that the sovereigns, the United States and the States, were liable for attorneys' fees as part of costs. Indeed, this Court has repeatedly recognized that, under basic principles of federalism, statutes that are applicable to common litigants are not applicable to the States.[1] *See Raygor v. Regents of the Univ. of Minn.*, 122 S. Ct. 999, 1006 (2002) (federal law which tolls statute of limitations on state law claims in federal court was inapplicable to the States); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000) (False

[1] Respondent's reference to English practice is unpersuasive for the additional reason that the English rule concerning attorneys' fees is in sharp contrast to the American rule, where the opposite approach is generally followed. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). Thus, even if the English rule allowed attorneys' fees to be awarded against the Crown – a claim not even respondent makes – it would not mean that an analogous practice was in place in America when the Constitution was ratified. "Of course, it is the American rather than the English common law tradition that is relevant." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

Claims Act is inapplicable to the States); *Will*, 491 U.S. at 70 (States may not be subjected to 42 U.S.C. § 1983 claims for damages); *cf. Alexander v. Sandoval*, 532 U.S. 275, 279-80 (2001) (declining to rule on the issue of whether there is a private right of action to enforce Title VI against the States). In other words, if respondent wishes to claim that the States historically have been subject to attorneys' fees as part of costs in federal courts, then the respondent must demonstrate that the States themselves, rather than common litigants, were subject to such liability. This they cannot do.

The States historically were not subject to liability for attorneys' fees in the federal courts, as shown by the fact that the States historically were not subject to the jurisdiction of the federal courts. *See Federal Maritime Comm'n*, 122 S. Ct. at 1870-71; *see also Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 846, 857 (1824) (holding that sovereign immunity barred a suit against the States). "The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" *Alden v. Maine,* 527 U.S. 706, 748 (1999) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). This was true even if a state officer, rather than the State itself, was named. *See Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110, 122-23 (1828). Indeed, it was not until 1908 that this Court firmly established jurisdiction to enjoin state officers who were violating federal law. *See Ex Parte Young*, 209 U.S. 123 (1908). And it was not until 1976 that this Court recognized a congressional power to abrogate

sovereign immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In sum, historically the States were not subject to the jurisdiction of the federal courts. Therefore, respondent is incorrect in its contention that the States have been historically subject to liability for attorneys' fees as part of costs in federal court.[2]

The respondent's contention that Congress has the power to subject the States to attorneys' fees regardless of the protections of sovereign immunity constitutes another reason for granting review. The writ should be granted to decide the validity of the respondent's contention.

4. Over the past two decades, this Court has recognized that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom" to be disregarded. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., joined by O'Connor, J., concurring). To protect the delicate balance between the States and the federal government, this Court has insisted that the sovereignty of the States can only be diminished by a clear expression of congressional intent contained in the statutory text. *See Raygor*, 122 S. Ct. at 1006. In other words, if Congress is going to impose a scheme where those who sue the States and prevail will recover fees as a matter of course, but that the States will

---

[2] There may have been an exception for original jurisdiction actions filed by one state against another in the Supreme Court pursuant to Article III, § 2 of the Constitution. In such cases, the sovereign immunity of one litigant is counter-balanced by the sovereign immunity of the other, so that special rules may apply. In any event, the requirement that States reimburse the tribunal for the costs of litigation is fundamentally different from paying the legal fees of a private litigant.

recover fees in only the rarest of circumstances, the actual statutory text of § 1988 must say exactly that.

The respondent, apparently realizing that there is nothing in the text of § 1988 to support the result in *Hensley*, insists that the Clear Statement Rule should not apply. Instead, the respondent asserts that there is "abundant evidence of Congressional intent," and that this Court relies on "the legislative history of § 1988 in construing the statute." Br. in Opp. at 14-15. Respondent again ignores the fact that States, as sovereigns in our constitutional system, are fundamentally different from private parties or local governmental actors. As noted above, this Court has repeatedly recognized this distinction. *See Raygor,* 122 S. Ct. at 1008 (federal law which tolls statute of limitations on state law claims in federal court was inapplicable to the States); *Vermont Agency of Natural Resources*, 529 U.S. at 779 (False Claims Act is inapplicable to the States); *Will*, 491 U.S. at 70 (States may not be subjected to 42 U.S.C. § 1983 claims for damages).

Quite simply, there is a conflict between the Clear Statement Rule and the result in *Hensley* as applied to the States. The writ should be granted in order to resolve that conflict.

5. Finally, the respondent simply misconceives the fundamental nature of the question when it asserts that States "are treated no differently from any other *defendants*." Br. in Opp. at 14 (emphasis added). The issue is not that State defendants are treated differently from private parties who may be named as § 1983 defendants. The issue is that, under *Hensley,* State defendants are treated unfavorably compared to the private *plaintiffs* who have brought them into Court. The losing State defendant

is almost always required to pay attorneys' fees; the losing private plaintiff almost never is. Even if the definition of costs could be legislatively expanded to include attorneys' fees, this uneven treatment is inconsistent with the even-handed approach that has traditionally governed the allocation of costs.[3] A departure from this traditional even-handedness may be constitutional where sovereign immunity is not an issue, or where sovereign immunity has been properly abrogated under Section 5 of the Fourteenth Amendment; however, it cannot be sustained where – as here – the entire argument for subjecting States to attorneys' fees is based on the theory that it is traditional to do so. The Commonwealth has demonstrated why such a reading of American legal tradition is untenable; but, if that reading is to be accepted, then certainly the States must be entitled to its benefits as well as its burdens.

Thus, this petition again presents an important constitutional question deserving of review by this Court in light of recent developments in its sovereign immunity jurisprudence.

---

[3] This tradition of even-handedness is demonstrated by respondent's reliance on *Alyeska* for the proposition that "since 1607 English courts have been empowered to award counsel fees to defendants *in all actions where such awards might be made to plaintiffs*." Br. in Opp. at 10 (quoting *Alyeska*, 421 U.S. at 247 n.18 (1975) (emphasis added)).

CONCLUSION

For the reasons stated above, in the petition for writ of certiorari, and in the *amicus* brief of the several States, the petition for writ of certiorari should be granted.

Respectfully submitted,

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM H. HURD
State Solicitor
Counsel of Record

JUDITH WILLIAMS JAGDMANN
Deputy Attorney General

MAUREEN RILEY MATSEN
WILLIAM E. THRO
Deputy State Solicitors

CHRISTY A. MCCORMICK
Assistant Attorney General

900 East Main Street
Richmond, Virginia 23219
(804) 786-2436 (voice)
(804) 371-0200 (facsimile)

Counsel for the Petitioners

August 16, 2002